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PEER REVIEW COMMITTEE

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While Hugo does not entirely dispense with traditional teleology, he does offer a new reading of human superiority. Contra Descartes, human power ought to be used for the benefit of the weak. "Whatever is weak has a claim on the goodness and pity of whatever is strong". It is that perception that has helped galvanize another, altogether different, Christian vision, namely philanthropy or benevolence, which was the ideological cornerstone for the first legal attempts at the protection of animals. It is still unclear whether the Christian tradition, which has been the captive of Cartesian thought for so long, can yet fully articulate the second, alternative reading of our relations with animals.

NOTES & COMMENTS

The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps to go

Margot Michel* **and Eveline Schneider Kayasseh†**

I. Introduction

In the last several years there have been various reforms enacted in Swiss law that were intended to improve the status and protection of animals. In 1993 the "dignity of the Creature" was enshrined in the constitution[1] and, building on that, was taken up in 2008 as the "dignity of animals" in the completely revised Animal Protection Act. Additionally, in 2003 a change of law went into effect, a landmark article in the Civil Code stated that animals are not objects. This effected changes to tort law, inheritance law and title law. And in the spring of 2010 there took place the internationally much observed referendum on the Swiss-wide introduction of "Animal Attorneys" – an initiative which was unfortunately rejected.

Most of these reforms are the product of popular initiatives. Switzerland's particular polity[2] – a semi-direct democracy with a highly developed right to popular votes, in particular popular initiative and the possibility of national referendums so as to change laws[3] – has proven to be a perennial instigator of improvements in the

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[1] An english translation of the Federal Constitution of the Swiss Confederation is available at http://www.admin.ch/ch/e/rs/c101.html (last visited April 10, 2011). As english is no official language of the Swiss Confederation, the translation has no legal force.

[2] Although lying at the heart of Europe and surrounded by EU member-states, Switzerland is not a member of the European Union – though it has a variety of relationships with the EU.

[3] *See* Walter Haller, The Swiss Constitution in a Comparative Context, Zurich/St. Gall 2009; for general information on the state system of Switzerland, also see http://www.admin.ch/org/polit/index.html?lang=en (last visited April 10, 2011).

protection of animals.[4] With the instrument of initiative, a popular vote can be held with regard to topics that find no majority in parliament; such impulses come from parliament itself, from the general population, from animal protection organizations, and from interest groups. Of course these initiatives are not inevitable successes – for example, the three-time rejection of initiatives to abolish or at least drastically reduce animal experiments,[5] or the recent initiative to introduce Animal Attorneys on a nationwide basis.[6] The Swiss public is actively engaged in questions of animal protection, and the corresponding initiatives and law changes and revisions have great resonance among the general populace and are passionately debated.[7] The instrument of referendum enables referendums on federal laws or the revision of laws; but in contrast to constitutional changes, referendums on laws are not compulsory.[8] In order to ensure that a federal law (e.g. the Animal Protection Act) will survive a possible referendum, an elaborate consultation process takes place (the so-called *Vernehmlassungsverfahren*, or legislative process by consultation) in which all interested parties, interest groups (e.g. animal protection organizations) and cantons are consulted as to their respective positions on the topic at issue. Then the preliminary version of the law is worked over and adapted so that in any possible referendum it would receive a prospective majority. In this way it is possible to influence – at least within certain parameters – legislation in the sphere of animal protection.

The following article gives an overview of the situation of animals in Swiss law. Additionally, the notion of the dignity of the Creature and its implications for the Swiss legal system will be more closely analyzed, and then the cornerstones of the overhauled Animal Protection Act (revised in 2008) will be discussed and embedded in the European legal tradition. Following this section will be one treating the particular instruments of enforcement in animal protection, for example the Animal Attorney or allowing animal protection organizations the right to appeal. We will also be taking an in-depth look at the situation of animals in civil law, in particular the changes in the status of animals that were effected by a 2003 change of the law. In this context, we will focus on four major issues. Firstly, we will take a brief glance at the legal status of animals in Swiss law; secondly, we will focus on

[4] For example, Thomas Gächter writes: the popular initiative frequently functions as an agent of innovation, as an engine of the political system. But this happens less by the way of direct acceptance of such initiatives through the people than through their indirect impact, as officials and parties are forced to develop direct or indirect counterproposals to the reform initiatives, which then often find majorities in national referendum." (Andrea Büchler/Thomas Gächter, Medical Law Switzerland, in: Herman Nys (editor), International Encyclopaedia of Laws, Medical Law, Kluwer Law International 2010, at 18).

[5] Referendums on the question took place in 1985, 1992, and 1993.

[6] *See infra* Part III.C.

[7] *See* Botschaft des Bundesrates zur Revision des Tierschutzgesetzes vom 9. Dezember 2002, in: Bundesblatt (hereinafter BBl) 2003, 657 et seq., at 661 et seq.

[8] Art. 141 Swiss Const. states that an optional referendum has to take place "if within 100 days of the official publication of the enactment of a federal act any 50,000 persons eligible to vote or any eight Cantons request it."

the computation of damages for an animal that is killed or injured by a third party; thirdly, we will show how exclusive ownership of a co-owned animal is acquired if the animal's human caregivers go their separate ways; and lastly we will discuss pets in wills and foundations.

The article will conclude with an annotated summary of the above and will propose steps to follow so as to further raise the status of animals within the context of law.

II. Animals in Public Law

A. Protection of the Dignity of the Creature in the Swiss Federal Constitution

In 1992, by way of a national referendum, Switzerland became the first country in the world to take up protection of the dignity of the Creature into its constitution. Three-quarters of the votes and all of the cantons except for one approved the new constitutional article. Article 120 Const. (The Swiss Federal Constitution is called*Bundesverfassung appreviated as* BV)[9] stemmed from a popular initiative that demanded greater protection against abuses of gene technology. In the English translation (which has no legal force) the provision reads:

> Art. 120 Const.
> 1 Human beings and their environment shall be protected against the misuse of gene technology.
> 2 The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, it shall take account of the dignity of living beings [*Würde der Kreatur*] as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species.

Its original conception being to protect against the abuses of gene technology, protection of the dignity of the Creature is today not only recognized as a constitutional principle having general validity throughout the whole legal system but as one that should guide state action.[10] To a certain extent the protection of the dignity of the Creature by the Swiss Federal Constitution thus succeeds in curbing

[9] Before the complete overhaul of the Federal Constitution in 1999, the provision was enshrined in article 24novies.

[10] See Lorenz Engi, Was heisst Menschenwürde? Zum Verständnis eines Verfassungsbegriffs, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 2008, 659 et seq., at 674; Peter Krepper, Tierwürde und Rechtsentwicklung in der Schweiz, Aktuelle Juristische Praxis (AJP) 1998, at 1147; Nils Stohner, Importrestriktionen aus Gründen des Tier- und Artenschutzes im Recht der WTO, Bern 2006, at 103; Rainer J. Schweizer & Peter Saladin, Kommentar zu Art. 24novies, in: Jean-François Aubert et al. (editors), Kommentar zur Bundesverfassung der schweizerischen Eidgenossenschaft, Basel 1995, Abs. 3 BV para. 119.

the legal order's dominant anthropocentrism[11] and is in accord with the document's preamble, which obliges the constitution to adopt a responsible stance vis-à-vis the Creation. It is a matter of debate as to whether the dignity of the Creature encompasses each and every individual or living beings as a whole.[12] But even if one were to apply a restricted biocentric definition to this constitutional right, the German term *Kreatur* would necessarily encompass all of non-human animate life, namely plants and animals.[13]

Nonetheless the concrete implications of the guarantee of the dignity of the Creature is still an object of controversy. The difficulties generated by this new constitutional concept can be seen, among other things, in the fact that the term is not uniformly employed in the German and French versions of the Federal Constitution. Whereas the German version avails itself of the phrase *Würde der Kreatur*, the French version speaks of the *intégrité des organismes vivants*.[14] This change – the French version originally had the phrase *dignité de la créature*, which is the obvious counterpart to *Würde der Kreatur* – was the doing of the Swiss translation bureau on the occasion of the complete overhaul of the Federal Constitution in 1999 and is not owing to a legislative decision. The Federal Ethics Committee on Non-Human Biotechnology (ECNH)[15] then declared that the terms "integrity" (*intégrité*) and "dignity" (*Würde*) were not the same, having different implications;[16] that is, not every encroachment on a living being's integrity is an injury inflicted on that being's dignity. Just as the preamble to the Swiss Federal Constitution obliges the document to adopt a responsible stance vis-à-vis the Creation – and similar to the term "fellow creatures" for animals (Tier als Mitgeschöpf) in German law[17] – so too does the phrase *Würde der Kreatur* have theological roots.[18] Even if its content

[11] *See* Rainer J. Schweizer, in: Bernhard Ehrenzeller, Philippe Mastronardi, Rainer J. Schweizer & Klaus A. Vallender (editors), Die schweizerische Bundesverfassung, Kommentar, 2nd ed., Zürich/Basel/Genf 2008, Art. 120 BV para. 17.

[12] Philippe Mastronardi, in: Bernhard Ehrenzeller, Philippe Mastronardi, Rainer J. Schweizer & Klaus A. Vallender (editors), Die schweizerische Bundesverfassung, Kommentar, 2nd ed., Zürich/Basel/Genf 2008, Art. 7 BV para. 11.

[13] *See* Saladin & Schweizer, *supra* note 10, at para. 114; Philipp Balzer, Klaus Peter Rippe & Peter Schaber, Menschenwürde vs. Würde der Kreatur, 2nd ed., München 1999, at 35: "Biocentrism regards *all* living things and *only* living things as objects of moral considerations"; further Stohner, *supra* note 10, at 100.

[14] The official English translation of the Swiss Federal Constitution, which has no legal force, takes a middle path through the French and German versions of the phrase, rendering it as "dignity of living beings" – the literal translation would be "dignity of the Creature."

[15] *Federal Ethics Committee on Non-Human Biotechnoloy ECNH*, http://www.ekah.admin.ch/en/index.html (last visited April 10, 2011).

[16] *Federal Ethics Committee on Non-Human Biotechnology ECNH*, Stellungnahme vom März 2000 according the French version of Art. 120 Const.

[17] § 1 Sentence 1 of the German Animal Protection Law reads: "As derived from humans' responsibility toward animals as their fellow creatures, the purpose of this law is to protect the lives and well-being of the latter."

[18] Klaus Peter Rippe, Ethik im ausserhumanen Bereich, Paderborn 2008, at 67; for a more detailed history of the concept of dignity, *see* Heike Baranzke, Würde der Kreatur? Die Idee der Würde im Horizont der Bioethik, Würzburg 2002, at 286 et seq.

cannot be theologically defined in a secular legal system, the phrase itself – *Würde der Kreatur* – has the emotional and symbolic power of a religious tenet.[19]

Various authors have come to grips with the notion of the dignity of the Creature in an attempt to nail it down conceptually.[20] In the literature treating the subject, there are, roughly speaking, two opposing schools of interpretation when it comes to the essential meaning of the dignity of the Creature. Whereas certain authors draw an analogy between the dignity of the Creature and that of humans,[21] other authors make a conceptual distinction between the two.[22] But irrespective of whether the dignity of the Creature is compared to or distinguished from that of human beings, the notion of human dignity itself has become central to the current debate:

Human dignity is – according to prevailing opinion – based on natural law and not on positive law and is thus anterior to and independent of the state decision-making process and the value judgments pertaining thereto.[23] Human dignity is a fundamental guarantee that human beings will be dealt with as independent subjects and the concept perforce forbids their degradation to the level of mere objects;[24] it protects a person in terms of "his or her inherent value and individual uniqueness and, where applicable, otherness;"[25] moreover, it is an unconditional right.[26] The constitutional guarantee of human dignity in a pluralistic society forms

[19] Rippe, *supra* note 18, at 67.

[20] But highly conspicuous is the fact that in those standard works on the Federal Constitution the dignity of the Creature would seem to lead a shadowy existence; the topic is oftentimes not even addressed; and if it is addressed only in the most rudimentary fashion.

[21] Bundesverfassung [BV] [Constitution] Apr. 18, 1999 SR 101, art. 7 (Switz.): "Human dignity must be respected and protected."

[22] Peter Kunzmann addresses the various viewpoints in detail: Kunzmann, Die Würde des Tieres – zwischen Leerformel und Prinzip, Freiburg/München 2007, passim.

[23] Philippe Mastronardi, Menschenwürde als materielle „Grundnorm" des Rechtsstaates?, in: Daniel Thürer, Jean-François Aubert & Jörg Paul Müller (editors), Verfassungsrecht der Schweiz, Zürich 2001, at § 14 para. 8; Ina Praetorius & Peter Saladin, Würde der Kreatur, Gutachten, Bern 1996, at 29.

[24] Mastronardi, *supra* note 12, Art. 7 BV para. 42; Ulrich Häfelin, Walter Haller & Helen Keller, Schweizerisches Bundesstaatsrecht, 7th edition, Zürich 2008, at para. 335c; Jean-François Aubert & Pascal Mahon, Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999, Zürich 2003, Art. 7 BV para. 5; For this view of human dignity, *see also* Günter Dürig's established formulation in which human dignity as such is injured when the concrete individual is debased to the level of a mere object and means to an end; Günter Dürig, Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktischen Wertesystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes, in: Archiv des öffentlichen Rechts 81 (1956), 117 et seq., at 127; of course this established wording fell prey to criticism because human beings are often not only mere victims of circumstance but also objects of the law and must submit to it regardless of their own personal interests, whereas this established wording allows for only a limited ability to orient oneself; on this debate, *see* Engi, *supra* note 10 at 662 with further remarks.

[25] Swiss Federal Supreme Court, decision No. 127 I 6 et seq., at 14 et seq.; Jörg Paul Müller & Markus Schefer, Grundrechte in der Schweiz: im Rahmen der Bundesverfassung, der EMRK und der Uno-Pakte, 4th ed., Bern 2008, at 1 et seq.

[vee] Regina Kiener & Walter Kälin, Grundrechte, Bern 2007, at 113.

the philosophical and normative basis of all fundamental rights and freedoms[27] and serves as a "portal to the admission of extra-legal valuations in the law."[28] Human dignity dictates a prohibition against the use of human beings simply as means to an end (e.g. so as to promote the common good), demanding that they always be considered ends in themselves.[29] The dignity inherent to human beings means that they are in and of themselves of value and do not merely assume such value when used for purposes alien to their own inherent value.[30] Human dignity is entitled to absolute and unrestricted protection[31] and may not be compromised in any political weighing of interests. The basic imperatives entailed in human dignity[32] – for example the prohibition against torture and any other form of cruel, inhuman or degrading treatment or punishment,[33] banishment of the death penalty[34] as well as equality before the law or the prohibition against discrimination[35] – are wholly independent of whatever political or other interests which might be at stake.[36]

Certain authors emphasize that the core concept of *Würde*, or dignity, is invariably connected with the imperative to desist.[37] Consequently, the dignity of the Creature is also to be understood in this sense – as the dictate to always and everywhere refrain from certain actions and to forbear from bringing any political

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[27] Thomas Fleiner, Alexander Misic & Nicole Töpperwien, Swiss Constitutional Law, Berne 2005, at para. 479; Markus Schefer, Die Kerngehalte von Grundrechten. Geltung, Dogmatik, inhaltliche Ausgestaltung, Bern 2001, at 5; René A. Rhinow & Markus Schefer, Schweizerisches Verfassungsrecht, 2nd ed., Basel 2009, at para. 168; *see also* Bernhard Rütsche, Rechte von Ungeborenen auf Leben und Integrität. Die Verfassung zwischen Ethik und Rechtspraxis, Zürich/St. Gallen 2009, at 290: "Thus does human dignity form the basis of the right to life and personal integrity, at least as concerns the core areas pertaining to these rights. (...).Someone possesses the right to life and personal integrity *because* he possesses human dignity. By extension, someone possesses the right to life and personal integrity *if* he has human dignity. Therefore, creatures who possess human dignity also possess the right to life and personal integrity."

[28] Mastronardi, *supra* note 23, at § 14 para. 7.

[29] This understanding of the concept of dignity goes back to the Enlightenment, in particular to Immanuel Kant. *See* Immanuel Kant, Grundlegung zur Metaphysik der Sitten, edited by Theodor Valentiner, Stuttgart 2008, 63 et seq. (originally published in 1786); Kurt Seelmann, Rechtsphilosophie, 4th ed., München 2007, at § 12 para. 5; Rhinow & Schefer, *supra* note 27, at para. 163; Mathias Mahlmann, Rechtsphilosophie und Rechtstheorie, Baden-Baden 2010, at § 28 para. 24.

[30] Praetorius & Saladin, *supra* note 23, at 29.

[31] Mastronardi, *supra* note 12, Art. 7 BV para. 52; Fleiner, Misic & Töpperwien, *supra* note 27, at para. 559; Kiener & Kälin, *supra* note 26, at 116.

[32] Cf. Häfelin, Haller & Keller, *supra* note 24, at para. 335c; Schefer, *supra* note 27, at 29.

[33] Bundesverfassung [BV] [Constitution] Apr. 18, 1999 SR 101, art. 10 par. 3.

[34] Bundesverfassung [BV] [Constitution] Apr. 18, 1999 SR 101, art. 10 par. 1.

[35] Bundesverfassung [BV] [Constitution] Apr. 18, 1999 SR 101, art. 8 par. 2: "No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability."

[36] *See* Mastronardi, *supra* note 12, Art. 7 BV para. 44.

[37] But according to Rippe, the idea of the absolute imperative to desist, even in relation to human dignity, cannot be intersubjectively justified; *see* Rippe, *supra* note 18, at 77 et seq.

weighing of interests to bear.[38] Because consistency would dictate that the Federal Constitution not use the concept of "dignity" in two completely different ways, the dignity of the Creature and that of human beings necessarily share the same essential meaning.[39] As with human dignity, the dignity of the Creature is thus "to be understood as the specific inherent value and worth of animals and plants – as 'integrity'."[40] This interpretation of the dignity of the Creature – even if, like human dignity, it were only linked to a very elemental protection – would have far-reaching effects on our interaction with non-human beings. Their exclusive and total instrumentalization for our own human purposes – e.g. the keeping of farm animals on a mass scale and the utilization of animals in experiments – would not be consonant with any such understanding of dignity.[41] The constitutional recognition of the dignity of the Creature would then have concrete effects in terms of legal policy on the forms of permissible uses to which animals are put.

Because of the far-reaching consequences of a dignity of the Creature that is understood in just this way, certain other authors assert that the dignity of the Creature concept should in fact be viewed in a way that is fundamentally different from the concept of human dignity.[42] In particular, the dignity of the Creature – according to them – has no absolute value and therefore is open to any considered weighing of interests.[43] Furthermore, use of the phrase "take account of" in the relevant constitutional provision is indicative of the fact that the dignity of the Creature has no absolute applicability.[44]

Depending on the precise form of argumentation, the categorial difference between human dignity and that of the Creature is based on the law's anthropocentric orientation, according to which only members of the human species can possess

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[38] Rippe, *supra* note 18, at 70.

[39] Schweizer & Saladin, *supra* note 10, Art. 24novies Abs. 3 para. 116; Engi, *supra* note 10, at 674 et seq.; he indicates further that even with recognition of fundamentally equal portions of dignity allotted to humans, animals and plants, there could still be no justification for equal legal claims – it is here that further distinctions are admissible, e.g. based on the varying capacities for suffering among humans, animals and plants; for a similar view, *see also* Stohner, *supra* note 10, at 100 et seq.; further Hermann Geissbühler, Die Kriterien der Würde der Kreatur und der Menschenwürde in der Gesetzgebung zur Gentechnologie, ZBJV 2001, at 230 et seq.

[40] Saladin & Schweizer, *supra* note 10, Art. 24novies Abs. 3 BV para. 116.

[41] *See* Andreas Brenner, UmweltEthik. Ein Lehr- und Lesebuch, Fribourg 2008, at 171 et seq.; Engi, *supra* note 10, at 675 et seq.; Saladin & Schweizer, *supra* note 10, Art. 24noves Abs. 3 BV para. 116; Praetorius & Saladin, *supra* note 23, at 44; Antoine Goetschel, Würde der Kreatur als Rechtsbegriff und rechtspolitische Postulate daraus, in: Martin Liechti (editor), Die Würde des Tieres, Erlangen 2002, 141 et seq., at 144 et seq.

[42] As noted by Balzer, Rippe & Schaber, *supra* note 13, at 41 et seq.; Rhinow & Schefer, *supra* note 27, at para. 169; *see* further Schefer, *supra* note 27, at 23 et seq.

[43] As noted by Aubert & Mahon, *supra* note 24, Art. 120 BV para. 9; Balzer, Rippe & Schaber, *supra* note 13, at 48; Andreas Kley, Menschenwürde als Rechtsprinzip? Überlegungen zur Rolle der Menschenwürde als Argument in rechtlichen und politischen Verfahren, in: Rainer C. Schwinges (editor), Veröffentlichungen der Gesellschaft für Universitäts- und Wissenschaftsgeschichte, Bd. 10, 259 et seq., at 270 et seq.

[44] Praetorius & Saladin, *supra* note 23, at 44; Stohner, *supra* note 10, at 100.

dignity in an absolute sense,[45] self-consciousness being the prerequisite for self-respect[46] as well as the human-immanent[47] capacity for reason and the potential for exercise of freedom of the will (autonomy).[48] Engi conclusively derives human dignity from the "indisposability" of humans – humans are beings that have become what they are and are not human products per se, and this becomingness is based on an extrapositive value that is not only to be respected but which ultimately forms the basis of their dignity.[49] But – as he argues – it is precisely this prerequisite that would apply to animals, for they too are not of human manufacture but rather living beings and thus, at core, likewise "indisposable."[50] Like human dignity, therefore, the dignity of the Creature is a form of inherent dignity.[51]

In a joint statement of the Federal Ethics Committee on Non-Human Biotechnology (ECNH) and the Swiss Committee on Animal Experiments (SCAE) the attempt was made to concretize the dignity of the Creature in the following way:

> Against the concept that humans alone are entitled to dignity and protection, the discussion concerning the dignity of Creation stands as a corrective to the immoderate and arbitrary way in which humans treat the rest of nature. Humans are required to show respect and restraint in the face of nature, due to their own interest in sustainable

[45] *See* e.g. Schefer, *supra* note 27, at 23 et seq.: "The understanding here is that all law ultimately concerns itself with human beings; it legitimizes itself insofar as it guarantees protection of the dignity of each and every human. This anthropocentric understanding of law and in particular fundamental rights clearly shows that the "dignity of the Creature" in article 120, paragraph 2 BV is ascribed a fundamentally different status than the human dignity of article 7 Const.: The defense of the "dignity of the Creature" remains instrumental for the defense of human dignity and is not some second, coordinated and at the same time fundamental and legitimizing topos of all law. From a practical standpoint this can be seen in the fact that in weighing the preservation of human dignity and an incursion on the integrity of an animal or plant, it is always the former – as a guarantee of that which is fundamental and inalienable – which takes precedence." However, this legitimization of human dignity through reference to the particular species to which a being belongs exposes itself to accusations of speciesism – and with good reason; cf Seelmann, *supra* note 29, at 210 et seq,

[46] This according to Balzer, Rippe & Schaber, *supra* note 13, at 41 et seq., according to which Great Apes such as chimpanzees, bonobos, gorillas and orangutans are ascribed self-consciousness but no normative concept of individual personhood which might be transcribed with the concept of self-respect; *see* Rhinow & Schefer, *supra* note 27, at para. 169, who sees the basis of human dignity in his capacity for self-respect, something of which only human beings and – as he himself concedes – chimpanzees are capable. But it remains an open question as to why this characteristic – which, according to his own understanding of it, is not even human from a purely species-specific standpoint – should form the basis of a categorical difference between human dignity and the dignity of the Creature.

[47] It is evident that a recognition of human dignity cannot be based on individual characteristics such as reason or autonomy because otherwise a large part of humanity would then forfeit their human dignity and the right to life and personal integrity upon which it is funded.

[48] *See* Mahlmann, *supra* note 29, § 28 para. 6, para. 42 ff.

[49] Engi, *supra* note 10, at 665 et seq.

[50] *See* Engi, *supra* note 10, at 673 et seq.

[51] Balzer, Rippe & Schaber, *supra* note13, at 39.

> resources as well as by dint of the inherent value ascribed to a fellow living creature. Living creatures should be respected and protected for their own sake.

In summary, one can safely assert that no single and uniform understanding of the content of the constitutional concept of the dignity of the Creature has as of yet crystallized.[52] Nevertheless, prevailing legal opinion is that protection of the dignity of the Creature necessitates respect for the inherent value of animals (and in certain cases, even plants).[53] This inherent value is neither based upon nor exhausts itself in considerations as to what use animals can be put to by humans;[54] rather, it respects animals in their own being and otherness. The Business Review Commission of the Upper Chamber formulated the issue in the following way:

> Animals are to be treated neither as humans nor as things but in accord with their dignity as living beings and according to the autonomous standard of their own needs. It is in this regard that their feelings are to be respected, their suffering reduced or avoided altogether, and their will to live respected. This emanates, for example, in their restrictive usage by humans.[55]

Even if the balancing of legally protected interests were to be judged as harmoniously with a respect for the dignity of the Creature, it would, in no case be permissible to grant human interests a general and absolute precedence.[56] Such would undermine the quintessence of the dignity of the Creature and reduce it to an empty phrase. Praetorius and Saladin only recognize such justificiations for encroachments on the dignity of the Creature as being appropriate when these are unavoidable and are matters of life and death: "Because if humans and non-human creatures are ascribed 'value in and of themselves' then human beings may only in principle seriously impair the life of other creatures if they would otherwise feel their own existence to be threatened."[57] Recognition of the dignity of the Creature

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[52] *See* Schweizer, *supra* note 11, Art. 120 BV para. 16.

[53] Statement of the Federal Ethics Committee on Non-Human Biotechnology ECNH, The Dignity of Living Beings with Regard to Plants: Moral Considerations of Plants for Their Own Sake, retrievable at http://www.ekah.admin.ch/en/documentation/publications/index.html (last visited April 10, 2011).

[54] Mastronardi, *supra* note 12, Art. 7 BV para. 10; Stohner, *supra* note 10, at 102.

[55] Business Review Commission of the Upper Chamber on „enforcement problems in animal welfare", November 1993, BBl 1994 I 618 et seq., at 5.

[56] Schweizer, *supra* note 11, Art. 120 BV para. 16; joint statement by the Swiss Ethics Committee on Non-Human Gene Technology (ECNH) and the Swiss Committee on Animal Experiments (SCAE), The Dignity of Animals, retrievable at http://www.ekah.admin.ch/en/topics/dignity-of-living-beings/index.html (last visited April 10, 2011);

[57] Praetorius & Saladin, *supra* note 23, at 44; likewise Beat Sitter-Liver, Würde der Kreatur: Grun-

forbids the exploitation of the animal and plant world *solely* for extrinsic purposes – and thus "human dignity and the dignity of the Creature are coherent in their programmatic content, which strives to achieve a life-form in which all of life should be respected and protected."[58]

It is through the recognition of the dignity of the Creature that one can at least derive the fundamental protection of life, for recognition of a living being and its own inherent value presupposes a recognition of that being's right to existence.[59]

The concept of animal dignity first emerged in two recent verdicts of Switzerland's highest court, the Swiss Federal Supreme Court, in October 2009.[60] These were judgments with respect to animal testing, and it was here that the Tribunal invoked the principal of the *dignity of animals* for the very first time:

> Even if it [the dignity of animals] cannot and should not be equated with human dignity, this indeed requires that natural creatures, at least to a certain degree, be regarded and valued as being of equal stature with humans. . . . The consanguinity existing between the dignity of animals and that of humans can be seen in particular with regard to non-human primates.[61]

Thus, the Swiss Federal Supreme Court does not equate the dignity of animals with that of human beings, while at the same time not drawing any categorial distinctions between the two conceptions but simply emphasizing their affinity. According to the Swiss Federal Supreme Court, this affinity is particularly pronounced in the case of non-human primates. This argumentation of course brings up the question as to whether the Federal Supreme Court regards this affinity, i.e. similarity, to humans as reason for stronger protections afforded by the concept of the dignity of animals – that is, the more that an animal is similar to human beings in terms of its cognitive ability, the more the protective sphere of the dignity of animals would be adapted to the protective sphere of human beings. Conversely this would also mean that animals whose cognitive ability is distinctly less than that of humans would still only be able to enjoy an attenuated protection of dignity. This hierarchization according to the prerequisite of similarity would to some degree contradict the concept of dignity as something that animals possess in and of

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dlegung, Bedeutung und Funktion eines neuen Verfassungsprinzips, in: Julian Nida-Rümelin & Dietmar von der Pfordten (editors), Ökologische Ethik und Rechtstheorie, Baden-Baden, 1995, 355 et seq., at 363.

[58] Mastronardi, *supra* note 12, Art. 7 BV para. 10 with references; similar also Stohner, *supra* note 10, at 102.

[59] *See* also Stohner, *supra* note 10, at 109; Peter Krepper, Zur Würde der Kreatur in Gentechnik und Recht, Basel/Franfurt am Main 1998, at 389; Dietmar von der Pfordten, Die moralische und rechtliche Berücksichtigung von Tieren, in: Julian Nida-Rümelin & Dietmar von der Pfordten (editors), Ökologische Ethik und Rechtstheorie, Baden-Baden 1995, 231 et seq., at 243 et seq.

[60] Swiss Federal Supreme Court, decision No. 135 (2009) II 385 et seq. and No. 135 (2009) II 406 et seq.

[61] Swiss Federal Supreme Court, decision No. 135 (2009) II 385 et seq., at 403.

themselves and through the inherent value of their very *otherness* – which of course would be independent of any similarity to humankind. Even if this gradation of protections can be discussed, in our view the concept of the dignity of the Creature would be better served were it to be linked with a creature's capacity for suffering – as opposed to its genetic and sensory-physiological relatedness to human beings. It remains to be seen how case law might further nuance the concept of the dignity of the Creature.

B. The Protection of Animals as a Constitutional Task and a Federal Animal-Protection Law

1. Overview

It is only since 1981 that Switzerland has had a federal animal-protection law, namely the Swiss Federal Animal Protection Act (hereinafter TSchG). This is based on a constitutional amendment that was passed with a clear majority by the Swiss people and the various cantons (Article 25a of the old Constitution; Article 80 of the revised Constitution), which grants the federal government extensive powers to enact provisions in the sphere of animal-protection. The federal government is thereby both empowered and commissioned with enacting regulations for the protection of animals, in particular laws concerning the keeping and care of animals, experiments on animals, procedures carried out on living animals, the use of animals, the import of animals and animal products, the trade in animals and transport of animals, andthe killing (including slaughter) of animals. We are dealing here with an endless list of areas which must be regulated. According to prevailing legal opinion, on the basis of this constitutional provision animal protection in Swiss law is a legally protected interest with constitutional status ;[62] enforcement of the regulations shall be the responsibility of the cantons, except where the law reserves this power to the federal government.

The First Federal Animal Protection Act of March 9, 1978 was wholly in the tradition of pathocentric animal protection, its primary goal being the avoidance of "unjustifiable suffering."[63] The law's implementary regulations were laid out in an Animal Protection Ordinance (hereinafter TSchV). The First Federal Animal Protection Act of March 9, 1978 and the accompanying Animal Protection

[62] Antoine F. Goetschel & Gieri Bolliger, Das Tier im Recht, Zürich 2003, at 199; *see* further Andreas Steiger & Rainer J. Schweizer, Kommentierung von Art. 80 BV, in: Bernhard Ehrenzeller, Philippe Mastraonardi, Rainer J. Schweizer & Klaus A. Vallender (editors), Die schweizerische Bundesverfassung, Kommentar, 2nd ed., Zürich/St. Gallen 2008, at para. 6.

[63] *See* Art. 2 par. 3 Animal Protection Act (9. März 1979), in effect until October 31, 2008: «No one is authorised to cause an animal pain, suffering or impairment or to frighten it without justification.» The term «unjustifiable suffering" indicates that it is a matter of weighing of interests – consequently, there are actions which inflict suffering on an animal, but are at the same time justified by the Animal Protection Act of March 9, 1978. This of course doesnt't justify these actions from an ethical point of view; cf. also Gieri Bolliger, Antoine F. Goetschel, Michelle Richner & Alexandra Spring, Tier im Recht transparent, Zürich 2008, at 10.

Ordinance of May 27, 1981 remained in forOn September 1, 2008, after more than a decade of preliminary work, the completely revised and current version of the Animal Protection Act (TSchG)[64] and the attendant Animal Protection Ordinance (TSchV)[65] entered into force. According to article 1 of TSchG, along with *protecting the welfare of animals*, the law affords explicit *protection of their dignity*; however, in contrast to Switzerland's German-speaking neighbors,[66] the law only applies to vertebrates (mammals, birds, reptiles, amphibians, fish), cephalapods (octopuses and squids) and crustaceans (lobsters and crabs).[67] The decisive factor as to whether an invertebrate comes within purview of the Animal Protection Act is determined by scientific findings (which are of course controversially discussed[68]) regarding the degree of sentience in invertebrates, which reveals the new law's close coupling with the capacity for suffering rooted pathocentric protection of animals.[69]

The Animal Protection Act contains fundamental provisions regarding the keeping, breeding, and genetic modification of animals. It addresses the trafficking and transport of animals as well as pain-engendering procedures on animals such as experiments and other research, as well as animal slaugther. It naturally elaborates the sanctions to be imposed for violations of the Animal Protection Act (administrative measures and penal provisions).

The detailed provisions can be basically found in the Animal Protection Ordinance, but the Animal Protection Act itself contains a fair amount of individual provisions because the cantons as well as the animal-protection organizations – with their eye to both greater co-determination[70] and uniform enforcement of the law – had expressed their desire[71] that, in terms of animal protection, there should be essential individual stipulations regulated at the level of the law itself.[72]

In contrast to the previous version, the new law contains certain legal definitions ; for example, in article 3 TSchG the welfare of animals is biologically defined as their keeping and feeding in a manner suitable to their bodily functions and behavior.

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[64] Tierschutzgesetz vom 16. Dezember 2005, retrievable at http://www.admin.ch/ch/d/sr/c455.html (in german only). (last visited April 10, 2011).

[65] Tierschutzverordnung vom 23. April 2008, retrievable http://www.admin.ch/ch/d/sr/c455_1.html (in german only). (last visited April 10, 2011).

[66] Germany has a more nuanced law for the various groups of animals. The Austrian animal-protection law basically covers all animals, i.e. also invertebrates; *see* Antoine F. Goetschel & Gieri Bolliger, Tierethik und Tierschutzrecht – Plädoyer für eine Freundschaft, in: Interdisziplinäre Arbeitsgemeinschaft Tierethik (editors), Tierrechte – Eine interdisziplinäre Herausforderung, Erlangen 2007, at 185.

[67] Art. 2 par. 1 TSchG combined with Art. 1 TSchV.

[68] Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 8.

[69] *See* Botschaft Tierschutzgesetz, *supra* note 7, at 674; Erläuterungen des Bundesrates der einzelnen Bestimmungen der Tierschutzverordnung, at 1.

[70] Federal statutes as the Animal Protection Act are – in contrast to the Animal Protection Ordinance - subject to optional referendum; *see* Haller, *supra* note 3, at 228 and *supra* sec. I.

[71] During the consultation procedure, all cantons, political parties, associations and other groups with particular interests in the subject matter are invited to express their views; *see* Haller, *supra* note 3, at 229 et seq.

[72] *See* Botschaft Tierschutzgesetz, *supra* note 7, at 659.

Furthermore, the animals must be able to behave in a way that is consistant with their species, they must be clinically healthy, and their pain, suffering, and harm must be avoided. Article 4 TSchG also lays down the principle that those who deal with animals must accommodate the animals' needs to the best of their ability and care for the animals' welfare –only insofar as the animal's "designated use" (this the disturbing but revealing term used by the law) permits it. The keeping of farm animals en masse and animal experiments, naturally within certain limitations, are thus essentially permissible along with any attendant suffering of the animals.[73] Therefore, the new animal protection law only prohibits the infliction of pain, suffering, or harm on animals; provoking anxiety in animals; or in any way infringing on the animal's dignity when this act would be "unjustified" – that is, without the presence of sufficient legal justification.Requisite here is a balancing of legally protected interests with primarily human interests in each particular case. Grounds of justification include legal permission for a certain action or the presence of a situation that calls for self-defense or some other state of emergency.[74] In addition, animals may not be mistreated, neglected, or overstrained; any violations in this regard are to be punished as cruelty to animals.[75] Further detailed provisions – for instance the prohibition on tethering animals for extended periods of time[76] or the prohibition on cropping the tail and ears on dogs[77] – can be found in the Animal Protection Ordinance.

In revising the Animal Protection Act, in particular those parts addressing the keeping and treatment of pets, long needed modifications were undertaken with regard to findings of modern behavioral research. For example, greater emphasis is placed on animals' need for social contact. The legislators also undertook the revision so as to improve what was recognized as insufficient enforcement of the animal-protection provisions.[78] But unfortunately the conscious decision was made not to seize this opportunity and heighten the general level of protection afforded animals in the Animal Protection Act.[79]

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[73] In the Animal Protection Ordinance there are specific *minimum* requirements pertaining to the keeping and accommodation of animals. It is through the determined enforcement of these provisions that the living conditions of many animals can be substantially improved; but enforcement is still lax in many cantons, as verified by the Foundation for the Animal in the Law in its 2008 analysis of Swiss enforcement of animal protection: Bolliger/Richner/Gerritsen, Schweizer Tierschutzstrafpraxis 2008, Sechster auswertender Jahresbericht über die Tierstraffälle-Datenbank der Stiftung für das Tier im Recht (TIR), Zürich, 23. September 2009, at 15 et seq.

[74] *See* Bolliger, Goetschel, Richner & Spring, *supra* note *63*, at 10.

[75] *Infra*, III.B

[76] Tierschutzverordnung (TSchV), Art. 3 par. 4 (2008).

[77] Tierschutzverordnung (TSchV), Art. 22 par 1 lit. A (2008).

[78] *See* Botschaft Tierschutzgesetz, *supra* note 7, at 662 et seq., 665 et seq.; Business Review Commission of the Upper Chamber on "enforcement problems in animal welfare", *supra* note 55, at 618 et seq.

[79] As noted explicitly and repeatedly by the Federal Council, see Botschaft Tierschutzgesetz, *supra* note 7, at 659.

2. Protection of the Dignity of Animals

The Federal Animal Protection Act takes up the constitutional mandate in article 1 TSchG, where there is explicit protection afforded the dignity of the animal.[80] In article 3a TSchG, one also finds this concept legally defined; the dignity of the animal, as employed in the Animal Protection Act, means that the "inherent value" of the animal must be respected:

> The dignity of the animal is regarded as having been violated if the animal's burdening cannot be justified through preponderant interests. An animal is considered as being burdened, in particular, when pain, suffering or harm is inflicted upon it, or when it is caused to have anxiety or is debased, when its pheontype or its capabilities are profoundly impinged or if it is unduly exploited.

In the revised Animal Protection Act the concept of "the dignity of animals" thus continues to encompass those classic aspects of the animal-protection law such as the absence of pain, suffering, harm, and anxiety, but it goes even further by including not only the biological aspects of this protection but the ethical ones.[81] But in the Animal Protection Act the legislators decided for those of the aforementioned conceptions of dignity that are susceptible to a weighing of interests. According to the Animal Protection Act, the dignity of animals is only violated when burdening the animal cannot be justified through "preponderant interests." In contrast to human dignity, and according to the Animal Protection Act, the dignity of animals is given only a relative weight.[82] In the opinion of the Swiss Federal Council it is presently impossible to define "dignity" in a more precise way – rather, it must be decided, on a case-by-case basis, and after a careful balancing of legally protected interests, whether or not an animal's dignity has been violated.[83]

But within the Animal Protection Regime itself, certain clarifications of animal dignity can be found. Certain excesses in animal breeding[84] or sexually motivated dealings with animals[85] injure the dignity of animals and are therefore prohibited. For instance, debasing an animal can consist in exhibiting it in such a way as to make it look ludicrous (e.g. dressed up in human clothes) or in training it to perform unnatural stunts so as to serve as a source of amusement or merriment for the public.[86] Violation of the dignity of animals is punishable as an act constituting cruelty to animals.[87]

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[80] The French version of the law likewise speaks of the "dignité de l'animal."
[81] Botschaft Tierschutzgesetz, *supra* note 7, at 674.
[82] *See* Rütsche, *supra* note 27, at 310.
[83] *See* Botschaft Tierschutzgesetz, *supra* note 7, at 675.
[84] Tierschutzgesetz (TSchG), Art. 10 par. 2 (2008).
[85] Tierschutzverordnung (TSchV), Art. 16 par. 2j (2008).
[86] *See* Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 18.
[87] Tierschutzgesetz (TSchG), Art. 26 par. 1a (2008). *See infra* III.B.

3. No Protection of Life

In contrast to the animal-protection laws in the German-speaking world (Germany[88] and Austria[89]) and to some degree in contrast to protection of the dignity of the Creature,[90] in the Swiss Animal Protection Act there is regrettably no protection for the life of the animal. This means that the killing of an animal is still fundamentally allowed so long as it remains within the parameters of the Animal Protection Act, and it requires no further justification. For instance, it is forbidden to kill animals in a way that inflicts anguish on them[91], which is why the killing of vertebrates may only be undertaken by persons with the requisite knowledge and ability[92]. Vertebrates may only be killed if they are first placed under anaesthesia,[93] and with mammals the anaesthesia must be administered before it is bled to death[94]**,** which excludes the ritual killing of animals undertaken without benefit of anaesthesia in certain belief systems.[95] Furthermore, the wanton killing of animals

[88] § 17 of the German animal protection law prohibits the killing of vertebrate animals without reasonable justification. The punishment is a prison sentence of up to three years or a fine; for the concept of "reasonable justification" *see* Ort/Reckewell, Kommentierung von § 17, in: Hans-Georg Kluge (editor), Tierschutzgesetz, Kommentar, Stuttgart 2002, § 17 para. 160 et seq.

[89] § 1 in combination with § 6 of the Austrian animal protection law forbids the killing of animals without "reasonable justification". Moreover, it is also prohibited to kill dogs or cats so as to produce food or other products; for a more detailed discussion of this provision, *see* Regina Binder & Wolf-Dietrich Freiherr von Fircks, Das österreichische Tierschutzrecht. Tierschutzgesetz und Verordnungen mit ausführlicher Kommentierung, 2nd ed., Wien 2008.

[90] The legislators have explicitly accepted the fact that there is a tension between the protection of the dignity and welfare of animals on the one hand and the lack of protection of their lives on the other; *see* Botschaft Tierschutzgesetz, *supra* note 7, at 674; for example, Goetschel & Bolliger allude to the fact that a fundamental protection for animals' lives can presently be derived from the constitutional principle of the dignity of the Creature; Goetschel & Bolliger, *supra* note 66, 186; the dignity of the Creature is discussed in detail above, section II.A.

[91] TierschutzGesetz (TSchG), Art. 26 par. 1b (2008).

[92] Tierschutzverordnung (TSchV), Art. 177 par. 1 (2008).

[93] Tierschutzerordnung (TSchV), Art. 178 par. 1 (2008); *But see* Tierschutzverordnung (TSchV), Art. 178 par 2 lit. b & Art. 185 par. 4 (2008) (exceptions including the killing of vertebrates when hunting and ritual killing of poultry).

[94] Tierschutzgesetz (TSchG), Art. 21 (2008).

[95] In Switzerland the ban on religious slaughter without anaesthesia has been enshrined in the constitution since 1892 when a national referendum decided the issue against the will of parliament and the Swiss Federal Council. In the total revision of the Animal Protection Act, the Federal Council – for reasons of religious freedom – provided for a relaxing of the prohibition on religious slaughter in the preliminary draft; but then – because of the overwhelming rejection of this proposal in the Swiss legislative process by consultation with the cantons, animal protection organizations and the general public – the Federal Council finally decided against it (*see* Botschaft Tierschutzgesetz, *supra* note 7, at 679). In Switzerland the prohibition against religious slaughter without anaesthesia is still a contested point among scholars and, to a degree, jurists, as it concerns the conflicting claims of the protection of animals and religious freedom; *see* e.g. Yvo Hangartner, Rechtsprobleme des Schächtverbots. Zugleich ein Beitrag zur Ungültigerklärung eidgenössischer Verfassungsinitiativen wegen Verletzung faktisch zwingenden Völkerrechts, Aktuelle Juristische Praxis (AJP) 2002, at 1022 et seq.; Sibylle Horanyi, Das Schächtverbot zwischen Tierschutz und Religionsfreiheit, Basel 2004.

is forbidden as well as the carrying out of contests in which the animals are killed or caused to suffer anguish, for example dogfights.[96]

4. Enforcement of the Animal Protection Act – the Sanction System

For all violations of the Animal Protection Act there is a two-track system of penalties applied. On the one hand there is the so-called administrative protection of animals, and on the other hand the law contains sanctions such as the elements of the offense of cruelty to animals, which is prosecuted by the penal authorities (penologic animal protection). Primarily responsible for enforcement of the provisions on the keeping of animals are the cantonal enforcement agencies and, as a rule, the cantonal veterinary services. In carrying out this task, the veterinary services have the authority to effect administrative measures and to impose administrative means of coercion.[97] For example, the Animal Protection Act says that the most severe administrative measure which can be leveled is that of prohibiting the keeping of animals on the part of someone who has repeatedly or gravely violated the animal's right to protection or who is unqualified to keep animals for whatever other reasons. Such prohibitions against keeping animals are valid throughout Switzerland[98] and are filed in a central register.[99] The authorities are obliged to intervene forthwith if they have ascertained that animals are being neglected or are being kept under totally inappropriate conditions[100]; in such cases, they can confiscate the animals. If the cantonal veterinary services suspect any violations of the Animal Protection Act, then they file charges[101].

The cantonal penal authorities deal with violations of the Animal Protection Act as well as with cruelty to animals[102]. Cruelty to animals is a criminal offense liable to public prosecution and is punished with a prison term of up to three years or with a fine[103]. Qualifying as animal abuse is the maltreatment, neglect[104] or unnecessary overwork or overexertion of animals or violation of their dignity, the excruciating killing of animals, the staging of fights between animals in which they are killed or tormented, and the disregard of provisions pertaining to animal experiments as well as exposing an animal.[105] But as the Foundation for the Animal in Law has shown in its annual investigation of Swiss law enforcement of animal protection, at the cantonal level offenses against the Animal Protection Act are prosecuted with varying degrees of intensity.[106] Should there be a conviction,

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[96] Tierschutzgesetz (TSchG), Art. 26 par 1 (2008).
[97] *See* Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 53.
[98] Tierschutzgesetz (TSchG), Art. 23 (2008).
[99] Tierschutzverordnung (TSchV), Art. 212a (2008).
[100] Tierschutzgesetz (TSchg), Art. 24 (2008).
[101] Tierschutzgesetz(TSchG), Art. 24 par. 3 (2008).
[102] Tierschutzgesetz (TSchG), Art. 26 (2008).
[103] Tierschutzgesetz (TSchG), Art. 26 (2008).
[104] Typical of such violations is leaving dogs in overheated cars; Bolliger, Richner & Gerritsen, *supra* note 73, at 29.
[105] But this is only rarely punished; Id. at 32 et seq.
[106] Id. at 19 et seq.

despite the wide range of possible sentences, as a rule people are let off with a fine of some several hundred Swiss francs.[107]

Along with revision of the Animal Protection Act there was a strengthening of the prevention of violations of the Act. Therefore, as a supplement to the penal system, the federal government stipulated that the public should be educated and informed as to the proper handling of animals, a task that was assigned to the Federal Veterinary Office.[108] Also to be mentioned here, for example, is the compulsory training of dog owners, which is divided into theoretical and practical parts.[109]

5. Evaluation

The Animal Protection Act sets limits to the use that humans can make of animals,[110] but it does not throw that use into essential question. The range of protections afforded animals remains very unambitious – thus, the provision against the infliction of suffering is restricted owing to its subordination to human interests. Of course, from an international perspective, the revised Animal Protection Act is still relatively progressive;[111] even so, the Act is the result of a political compromise that would be able to survive an optional referendum, and so the protections it affords the suffering of animals is in our view too limited and – despite certain welcome improvements – fails to keep pace with recent developments.

In particular, it seems to us that – alongside expansion of the standard of protection – the next logical step is establishment of a protection for the life of the animal. Even if the practical impact of such a fundamental protection should not be too highly rated (as can be seen in the case of Austria and Germany), it would at very least be an expression of the change in attitude toward animals in our society. The change from a fundamental, albeit conditional, permission to kill animals to a fundamental prohibition of such with the requirement of justification in the case of violation of this principle – this can reasonably be termed a kind of paradigm shift. It was as early as 1989 that the Swiss Federal Supreme Court stated:

> Only a comprehensive protection of the animal's life can do justice to today's ethical notions, and certain exceptions (food production, pest control) cannot unsettle its foundations. As within the scope of the Animal Protection Act, this principle at least applies to vertebrates.[112]

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[107] Id. at 33 et seq.

[108] Informations on the Federal Veterinary Office are available at http://www.bvet.admin.ch/index.html?lang=en. (last visited April 10, 2011) .

[109] Tierschutzverordnung (TSchV), Art. 68 (2008).

[110] *See* Botschaft Tierschutzgesetz, *supra* note 7, at 673.

[111] *See* Marc Bekoff (editor), Encyclopedia of Animal Rights and Animal Welfare, 2nd edition, Santa Barbara 2010, volume 2, at 362.

[112] Swiss Federal Supreme Court, decision No. 115 IV 248 et seq., at 254. Of course it is questionable as to whether food production in the present day can still suffice as justification; but in Germany and Austria this is the case.

C. Animal Attorney and the Right to Appeal of Animal Rights Organizations

In order to improve the recognizably inadequate enforcement of the Animal Protection Act, in 1991 the Canton of Zurich introduced the world's first office of the "Attorney for Animal Protection in Criminal Affairs" (Animal Attorney).[113] In criminal prosecutions based on violations of the Animal Protection Law, the Animal Attorney looks after the interests of the animals concerned and represents these in penal proceedings.[114] In both the investigatory and main proceedings the Animal Attorney has the same rights as an attorney working on behalf of any aggrieved human; that is, he can search a file, participate in fact-finding activities and trial dates, designate witnesses and experts as well as appeal verdicts and stop notices.[115] The Animal Attorney is not bound up with any government authority but acts as a normal and fully independent lawyer.[116] In the Canton of Zurich enforcement of the Animal Protection Act improved markedly after introduction of the Animal Attorney.

On March 7, 2010 a referendum took place on an initiative of Swiss Animal Protection to introduce Animal Attorneys throughout Switzerland, but it unfortunately ended in a clear defeat for the initiators (70 percent no-votes) – and the initiative was even rejected in the canton of Zurich (63 percent no-votes). It was from this referendum result that the cantonal health department not only drew the impermissible conclusion that the citizens of Zurich no longer backed the Animal Attorney but it felt thereby entitled to abolish the office of Animal Attorney through this provision's insertion into the initiative for introduction of a new federal code of criminal procedure in so unobtrusive a manner that the cantonal parliament only realized that it had abolished the cantonal Animal Attorney after the election was over.[117]The populace was taken aback. From a democratic standpoint, such actions are extremely dubious and testify to a lack of diligence when it comes to handling referendums. There are presently efforts being made to reintroduce the office of Animal Attorney by means of a cantonal initiative. In any event, in the future in the canton of Zurich the cantonal Veterinary Office will look after animal rights. But it is doubtful whether this state post will pursue cases of cruelty to animals with the same determination as the Animal Attorney; inadequate state enforcement was the very reason why the Animal Attorney was created in the first place. And with

[113] For the story behind establishment of the Zurich *Tieranwalt*, *see* Goetschel, Animal Welfare Legislation in Switzerland, A Report by the Foundation for the Animal in the Law, February 2002, at 7 and Animal Cloning and Animal Welfare Legislation in Switzerland, A Report by the Foundation for the Animal in the Law, September 2001, at 17 (both retrievable at http://www.tierimrecht.org/en/artikel/index.php?we_lv_start_0=10 (last visited April 10, 2011); further Antoine F. Goetschel, Der Zürcher Rechtsanwalt in Tierschutzstrafsachen, Schweizerische Zeitschrift für Strafrecht, Band 12 1994, Heft 1 68 et seq., at 73 et seq.

[114] Bolliger, Richner & Gerritsen, *supra* note 73, at 19.

[115] Id.

[116] Daniel Kettiger, Tierschutzanwalt: Was lässt das Bundesrecht künftig noch zu?, Jusletter vom 29. März 2010, at para. 8.

[117] *See Endgültiges Aus für den Zürcher Tieranwalt*, NZZ Online, June 30, 2010, http://www.nzz.ch/nachrichten/zuerich/tieranwalt_bundesgesetz_1.6326868.html.

this shakeup much specialized knowledge has been lost. In any event, it will be important to watch closely how the situation develops for the main actors in this drama – the animals.

Other cantons have never had actual independent Animal Attorneys, but they nevertheless have certain procedural laws with regard to animal law that have likewise effected improvements in enforcing the statutes. For example the canton of St. Gallen, where there is a special prosecutor entrusted only with the enforcement of the Animal Protection Act. This criminal prosecutor can make use of every means of investigation as stated in Articles 139 et seq. of the code of criminal procedure. In the canton of Bern there is a kind of organizational right of appeal: the governing body of the Animal Protection Organization can be a plaintiff in a private criminal action[118] and even has a right of appeal in administrative procedures – i.e. in those far more frequent procedures when it comes to the protection of animals. In Switzerland there has long been an organizational right of appeal for environmental organizations, but for animal protection organizations there has not been any such right at the federal level to date.

III. Animals in Civil Law

A. General remarks

On April 1, 2003 a new era began in Swiss private law: after perennial preparatory work and heated public debates new provisions became effective in the Swiss Code of Obligations[119] (hereinafter: Swiss CO) and the Swiss Civil Code (hereinafter: Swiss CC),[120] amongst other laws, which pertain to companion animals.[121] The purpose of this legislation was to accommodate in the law the changed perception of the majority of the Swiss population towards animals in general[122] and the valuation of specific companion animals by individuals in particular. Swiss private law should no longer be silent about those who are sometimes called 'significant others'[123] and their special value for their keepers. To that effect, the focus of the legislator was primarily on so-called non-commercial animals and legal issues concerning them, their keepers and third parties.

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[118] *See* Bolliger, Richner & Gerritsen, *supra* note 73, at 20.

[119] Systematic Compilation of the Federal Legislation, No. 220 (hereinafter: SR No.).

[120] SR No. 210.

[121] Switzerland's Criminal law and the law concerning debt recovery and enforcement have been revised too. These provisions will not be discussed in this paper.

[122] *See Bericht der Kommission für Rechtsfragen des Ständerats, Parlamentarische Initiative. Die Tiere in der schweizerischen Rechtsordnung*, in Bundesblatt Vol 25 (Jan. 2002), at 4166, *available at* http://www.bj.admin.ch/bj/de/home/themen/gesellschaft/gesetzgebung/abgeschlossen_projekte0/ (hereinafter: Parliament Initiative).

[123] Sheila Bonas, June McNicholas & Glyn M. Collis, *Pets in the Network of Family Relationships: An Empirical Study*, *in* Companion Animals & Us 212 (Anthony L. Podberscek, Elisabeth S. Paul & James A. Serpell eds., Cambridge University Press 2000).

B. The Legal Status of Animals

Mostly due to the prevailing Roman legal tradition Swiss law did not differentiate between things and animals before the legislative change in the year 2003. In fact, animals were not separately mentioned in the law of property at all, which simply referred to 'things'. Domesticated animals were treated as property under the law and had no independent legal rights. On April 1, 2003, Article 641a of the Swiss CC came into effect stating the following: "[1] Animals are not objects. [2] Where there exist no special regulations for animals, the provisions for objects apply." [124]

The formulation of Article 641a is very much like Germany's Civil Code § 90a[125] and Austria's § 285a[126]. Similar to those countries, Switzerland did not take the step to introduce a separate legal category for animals into law. It was probably the result of opposition in the Swiss parliament and the prevailing fear of some interest groups that animals could be deemed juristic persons with their own independent legal rights (and thus e.g. be party to a lawsuit in court).[127] The new law simply states that animals are no longer 'objects'. Obvious is the lack of a definition which clarifies their concrete legal status. Even though the legislator's intention was to improve the legal status of animals, most 'special regulations' relating to animals mentioned in paragraph 2 do first and foremost improve the legal position of the animal's owner or keeper, and not the animals' itself. Correspondingly, it crystallizes from the legislative material that Article 641a of the Swiss CC is primarily of a declarative nature; the introduction of a separate legal category for animals was actually never intended.[128] Animals thus have neither gained legal personhood nor do they have human caregivers or guardians instead of owners. Of course the law states that they are no longer objects; but in most cases they are still treated as such. However, even though the provision is an obvious political compromise, it delivers an important message: Swiss law recognizes that animals are sentient beings and not just another object like a car or a chair. They are also not toys that can be disposed of at discretion. They are living and feeling fellow creatures with dignity – actual facts and legal realities that can no longer be ignored by courts, lawyers and private persons alike.

[124] Siegfried Wyler & Barbara Wyler (ed.), Swiss civil code: English version. Based on the translation by Ivy Williams (Zurich 2009). The English version is not considered to be an official version in Switzerland. In this paper, the terms 'things' and 'objects', as well as 'pets' and 'companion animals', will be used interchangeably. The original text in German has the following wording: „Article 641a II. Tiere. [1] Tiere sind keine Sachen. [2] Soweit für Tiere keine besonderen Regelungen bestehen, gelten für sie die auf Sachen anwendbaren Vorschriften."

[125] § 90a BGB (Germany).

[126] § 285a ABGB (Austria).

[127] *See* Parliament Initiative, *supra* note 122, at 4167.

[128] *See* Parliament Initiative, *supra* note 122, at 4168.

C. Damages for the Injuring or Killing of an Animal

1. Tort Law

1.1 Preface: The Valuation of Property

There is no definition in Swiss law as to what constitutes damage (in German: 'Schaden'). According to the Federal Supreme Court of Switzerland,[129] the basis for the computation of damage in Switzerland is the difference in the plaintiff's wealth immediately before and after the defendant's wrongful action or omission. In other words, damages (in German: 'Schadenersatz') are measured based on the idea that the plaintiff's balance sheet shows a pecuniary loss as a result of the defendant's actions. One whose property is damaged, converted or destroyed is not entitled to recover for sentimental attachment to the property, except where the defendant's actions amount to a qualified injury of a person's individual inherent rights (violation of the plaintiff?s personality).[130]

Generally speaking, if personal property is completely destroyed, the cost of replacement with an equivalent is to be reimbursed. The same applies to mere harm to property, if the costs of repair together with other costs are disproportionate compared with the replacement value.[131] If the harm to the property is minor, reasonable costs of repair as well as any remaining diminution in value constitute the measure of damages.[132] In order to recover damages, a plaintiff must not only prove harm, but also unlawfulness of the defendant's action or omission, fault and causation.

1.2 Traditional Approach with Regards to Animals

In keeping with the animal's legal status of property, the measurement of damages followed the rules developed for personal property. So in principle, if an animal was injured or killed, its owner was entitled to recover the animal's replacement cost or expenses incurred as a result of the curative treatment of the animal (veterinary expenses), as the case may be, as long as the latter were not higher than the replacement value. It has been noted by some commentators though, that the courts would not have ruled out the recovery of higher veterinary expenses in any case.[133]

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[129] *See* Federal Supreme Court of Switzerland, decision No. 133 III 462 at 471.
[130] Articles 47 and 49 of the Swiss CO.
[131] Adjustments might be made if the replacement goods are worth more than the original.
[132] *See* e.g. Heinz Rey, Ausservertragliches Haftpflichtrecht (4th ed. Zurich/Basle/Geneva 2008).
[133] *See* Parliament Initiative, *supra* note 122, at 4171 et seq. (however no cases officially reported).

1.3 Current Approach with Regards to Animals

a. Introduction

In 2003, Article 42 para. 3 and Article 43 para. 1bis of the Swiss CO came into effect. Article 42 para. 3 concerns damages for incurred veterinary expenses, while Article 43 para. 1bis gives the judge the power to award an amount for the sentimental value of an animal to its owner (in German: 'Affektionswert') under certain circumstances. These provisions quite clearly acknowledge that most of our companions' value is not primarily financial, but emotional. Accordingly, the articles are only applicable if an animal is kept in the domestic environment and not for pecuniary or profit-making purposes.[134] Broadly speaking, the law differentiates between companion animals and animals of commercial importance ('commercial animals'). It has to be pointed out, however, that it remains to be seen how a court would make the exact distinction between commercial and non-commercial animals. Through studying the legislative materials one comes so far to the conclusion that the injured or killed animal in question must be kept privately and in a certain spatial proximity to its owner or keeper.[135] Additionally, the sentimental interest in the animal must at least outweigh pecuniary interests. If pecuniary interests prevail and/or the animal is not kept privately, it is regarded as a commercial animal and damages will be determined according to the traditional valuation method as shown above.[136]

b. Veterinary expenses

In Swiss law a judge can award veterinary expenses which incurred as a result of an injury to a companion animal, even if these costs are higher than the animal's actual value. Article 42 para. 3 of the Swiss CO reads as follows:

> In the case of animals that are kept in a domestic environment and are not kept for pecuniary or profit-making purposes, medical treatment costs may be asserted reasonably even if they exceed the value of the animal.[137]

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[134] The same precondition applies to several other provisions which have been added to the Swiss CO and the Swiss CC as well as other laws in 2003. – In German: „Tiere, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden (…)".

[135] Article 43 para. 1bis Swiss CO allows the judge not only to award damages to the owner but also to the keeper.

[136] Eveline Schneider Kayasseh, Haftung bei Verletzung oder Tötung eines Tieres – unter besonderer Berücksichtigung des Schweizerischen und U.S.-Amerikanischen Rechts (Zurich 2009), at 56 et seq.

[137] Swiss American Chamber of Commerce, Swiss Code of Obligations. Volume I: Contract Law (Articles 1-551). English Translation of the Official Text (Zurich 2008). In German: "Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, können die Heilungskosten auch dann angemessen als Schaden geltend gemacht werden, wen sie den Wert des Tieres übersteigen."

As discussed above, until recently, treatment costs would not be awarded if they were higher than the companion animal's actual value. Article 42 para. 3 shows that the importance of the animal's value for determining the proper measure of damages has become less because now, veterinary expenses that are higher than the replacement value can be claimed as long as these costs are reasonable. However, it is a well-known truth that what is reasonable for one person might not necessarily be reasonable in the eyes of another person. Since the law does not elaborate on this point, it is the scholar's and judge's task to develop an objective rule which can be used as a guideline. Consulting the legislative material we gather that the judge will have to consider how *a reasonable owner in the position of the plaintiff* would have acted if he had to pay for the incurred veterinary costs himself. Of course this 'reasonable person' must be someone who likes animals. Hence on the one hand the judge has to bear in mind that our society and laws understand the emotional relationship between a human being and a companion animal worthy of protection. But on the other hand a reasonable animal owner would also consider such factors as the animal species, its age and health, its value, the tenability of the treatment from the point of view of the veterinary science as well as the best interest of the companion animal with regards to animal welfare/animal protection.[138] In contrast the financial situation of the plaintiff is of no relevance. This is so because high treatment costs would never be reasonable in terms of how a reasonable owner in the plaintiff's shoes would act if he had serious money problems, a result which would be contrary to the legislator's intention.[139]

c. Damages for Non-Pecuniary Loss

aa) Sentimental Value of the Animal to the Owner ('Affektionswert')

Before the legislative change in the year 2003, the German term 'Affektionswert' – generally speaking, the sentimental or emotional value[140] of a thing to a person – was not mentioned in any of Switzerland's laws. According to § 1331 of Austria's Civil Code, however, a plaintiff can recover the value of 'special affectation'. Albeit this provision is similar to Switzerland's Art. 43 para. 1bis CO, a closer examination shows that it is in fact very different in some of its particulars. In Austria, the value of 'special affectation', or sentimental value, can only be recovered if an object was harmed wantonly, mischievously, or by an

[138] Cf. Schneider Kayasseh, *supra* note 136, at 90 et seq.

[139] Cf. for Germany: District court (in German: 'Amtsgericht') Idar-Oberstein, NJW-Rechtsprechungs-Report 1999, at 1629 „Auszuscheiden hat als Kriterium die wirtschaftliche Lage des Geschädigten, da man ansonsten dem Vermögenden jeden noch so aberwitzigen Aufwand ersetzen müsste, der nur den Heilungsprozess fördert, dem Sozialhilfeempfänger hingegen den Tierarztbesuch verweigern würde, da er sich in seiner wirtschaftlichen Lage noch nicht einmal die Spritze zum Einschläfern des Tieres leisten könnte." – Summarized translation: one would have to award the rich plaintiff even whimsical treatment costs whereas the poor plaintiff wouldn't even get the cost of the syringe with which the animal is put to sleep.

[140] 'Sentimental' and 'emotional' will be used interchangeably, both meaning the same in the context of this paper.

act contrary to the countries' criminal laws, which is not a prerequisite in today's Swiss law. Even though the killing of cats by using them as a target is mentioned in the doctrine, the provision does not seem to have much practical relevance in our neighboring country.[141]

During the lawmaking process in Switzerland it was highlighted that most animals which are kept as companions have an emotional value to their caregivers and that the hitherto existing valuation method was out-dated. It was recognized that where a living creature rather than a mere object is harmed unlawfully, the plaintiff should also be in a position to claim damages for the sentimental value.[142] Hence, Article 43 CO was amended and para. 1[bis] was added to the law, holding the following:

> In the event of injury or death of an animal that is kept in a domestic environment, and is not kept for pecuniary or profit-making purposes, the judge may take into account to a reasonable degree the emotional value of such animal to the keeper or the persons close to him.[143]

Interestingly, the law speaks of animal 'keeper' and not 'owner'. Ordinarily, in Swiss law, that person is entitled to damages who is the owner of a piece of property. Contrary to this basic rule, the new law recognizes that sometimes a mere animal keeper can develop a very special attachment to a companion animal whereas the same might not be true for the actual owner. Accordingly, the animal keeper does not necessarily have to be identical with the owner in order to be compensated. It further crystallizes that the keeper's or owner's relatives, as the case may be, have a separate claim for compensation, if they can successfully prove a qualified attachment to the diseased, injured or killed animal.[144] And most importantly, according to the legislative material, the sentimental value has to be compensated besides the mere replacement costs or veterinary expenses or even in addition to all of these costs, depending on the circumstances of the case.[145]

The idea of awarding compensation for the sentimental value of an animal to its owner/keeper and/or relatives, which constitutes non-pecuniary loss, and the difficulty associated with determining whether and to what extent someone has suffered such loss, as well as the legal qualification of this award, have been hotly debated.[146] Additionally, the legislator and the doctrine voiced their concern about

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[141] Rudolf Reischauer, in: Peter Rummel (ed.), Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch in 2 Bänden, Band 2, Teilband 1-2: §§ 1175-1502 ABGB, Nebengesetze (Vienna 2004), § 1332a ABGB para. 5; Friedrich Harrer, in: Michael Schwimann (ed.), ABGB Praxiskommentar, Band 6, §§ 1293-1502 ABGB (3rd ed. Vienna 2005), at § 1331 ABGB para. 3.

[142] *See* Parliament Initiative, *supra* note 122, at 4172.

[143] *See* Swiss American Chamber of Commerce, *supra* note 137. In German: "Im Falle der Verletzung oder Tötung eines Tieres, das im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten wird, kann er dem Affektionswert, den dieses für seinen Halter oder dessen Angehörige hatte, angemessen Rechnung tragen."

[144] Cf. Schneider Kayasseh, *supra* note 136, at 150 et seq. *See also* Peter Krepper, Affektionswert-Ersatz bei Haustieren, Aktuelle Juristische Praxis (AJP) 2008, at 704, 712.

[145] Cf. Schneider Kayasseh, *supra* note 136, at 147.

[146] *See* e.g. Roland Brehm, Berner Kommentar. Band VI. Das Obligationenrecht. 1. Abteilung.

the difficulty of differentiating between the 'sentimental value of an animal to its keeper' and compensation for emotional distress caused by an injury to individual inherent rights as per Article 49 of the Swiss CO.[147] These are interesting questions which have been rarely discussed in the doctrine so far. Remarkably, some of these points of interest were not even addressed by the legislator.

As a matter of fact, an exact computation of damages is virtually impossible where an emotional value has been harmed. But on the other hand, the same is true for claims for damages for emotional distress with which Swiss law has been familiar for decades. In order to define a sentimental value, one needs in a first step to address the special bond between caregiver and companion animal from a practical point of view. In fact, the importance of the bond between humans and other animals has been the topic of countless studies.[148] The results of some of these studies can be used in order to determine what makes the human-animal-bond so special for the society as a whole and for the individual in particular. Moreover, these studies allow us to develop a concept for the valuation of the emotional bond between caregiver and animal.

Generally speaking, the sentimental value of an animal represents to its human companion[149] a real, if non-pecuniary value and may be defined as the whole of the positively perceived aspects of the human-animal relationship. If a companion animal is injured or killed, this special value is either completely lost for its human caregiver or at least harmed. In order to compensate a plaintiff for the sentimental value, both its existence and extent must be established by objective evidence so that in a second step a monetary equivalent can be estimated. Schneider Kayasseh suggests to analyze the human-animal-bond on the following grounds: Quality and quantity of the time spent with the companion animal, the environment of the plaintiff (his or her age, health, family ties etc.), circumstances concerning the animal itself (circumstances surrounding its acquisition, its character, appearance, and life expectancy etc...), and last but not least, duration of the human-animal relationship. Because every relationship is different, the criteria and their weight can differ considerably, but they allow developing a pattern in order to determine if a human-animal relationship was particularly close or very loose. Once the intensity of the emotional bond and its duration are established, the court has the task to award a corresponding amount of money. As a rule of thumb, the more intense the

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Allgemeine Bestimmungen. 3. Teilband, 1. Unterteilband. Die Entstehung durch unerlaubte Handlungen. Kommentar zu Art. 41-61 OR (3rd ed. Bern 2006); Guy Chappuis, Die neuen Rechte des Halters eines getöteten oder verletzten Tieres – Wie neu sind sie wirklich?, HAVE 2004, at 192 et seq.; Franz Werro, La responsabilité civile (Bern 2005), paras. 167 et seq. and 1300 et seq.

147 *See* e.g. The Opinion of the Swiss Federal Council, BBl 1999, at 9541, 9545 and BBl 2002, at 5806, 5808 as well as the authors cited *supra* note 146.

148 *See* e.g. amongst many others: Anthony L. Podberscek, Elisabeth S. Paul & James A. Serpell (eds.), Companion Animals & Us (Cambridge 2000), at 125 et seq.; Ian Robinson (ed.), The Waltham Book of Human-Animal Interaction: Benefits and responsibilities of pet ownership (1st ed., Melton Mowbray, Leicestershire 1995); Alan Beck & Aaron Katcher, Between Pets and People, The Importance of Animal Companionship (West Lafayette 1996).

149 Who, in this case, can be the keeper, owner or relative.

bond between human and animal and the longer the duration of this relationship, the higher are the damages.

The whole of the monetary equivalent to the sentimental value has to be compensated if the animal was killed. If the animal escaped alive but its injury has a lasting impact on the human-animal relationship, the damages will be calculated by taking into consideration how badly the relationship has been harmed by the injury. Examples are the animal that has a lower life-expectancy due to the injury, is sick for a very long time, will need special care and/or food, manifests changes in its character, or has scars. However, because the companionship of the animal can in most cases still be enjoyed, the defendant only has to pay a certain percentage of the total compensation.[150]

bb) Reparations for Severe Emotional Distress

Sometimes plaintiffs also claim to have suffered emotional distress due to the circumstances of the case. Swiss law grants a person who has suffered qualified emotional distress due to physical or mental injury or an unlawful injury to his or her individual inherent rights the right to recover non-pecuniary damages in the form of 'satisfaction' (in German: 'Genugtuung') under certain conditions (Articles 47 and 49 of the Swiss CO). As a general principle it can be said that only significant violations entitle a person to a monetary compensation for emotional distress. This is because damages for non-pecuniary loss are handled with some reserve in Switzerland and therefore no satisfaction is due for insignificant harm.

In connection with the present discussion, Article 49 para. 1 of the Swiss CO is of particular interest. This provision reads:

> If individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for damage sustained and, if the particular seriousness of the injury and of the fault justify it and has not been compensated otherwise, claim payment of a sum of money as reparations.[151]

The general reluctance of the Swiss courts to award an amount of money as reparations is of particular significance when the plaintiff is a grieving animal owner. According to commentators, the gravity of the offence may justify a monetary award for instance in the following circumstances: an animal was tortured to death, it was severely mutilated or in other cases of malicious intent and/or cruelty to animals.[152]

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[150] The 'total compensation' amounts to the whole monetary equivalent to the sentimental value. – *See* for a detailed analysis Schneider Kayasseh, *supra* note 136, at 155 et seq.

[151] Swiss American Chamber of Commerce, *supra* note 137. Translated from German: "Wer in seiner Persönlichkeit widerrechtlich verletzt wird, hat Anspruch auf Leistung einer Geldsumme als Genugtuung, sofern die Schwere der Verletzung es rechtfertigt und diese nicht anders wiedergutgemacht worden ist."

[152] Schneider Kayasseh, *supra* note 136, at 177 et seq. *See also* Vito Roberto, Schweizerisches Haftpflichtrecht (Zurich 2002), at paras. 909 and 917.

cc) Punitive Damages

Punitive damages are not a concept recognized in Switzerland's legislation, and the Federal Supreme Court of Switzerland stated in a decision dating back to 2004 that punitive damages are contrary to Swiss *ordre public*.[153]

2. Breach of Contract

In many instances the animal's owner may have been harmed by tort and breach of contract simultaneously (e.g. in many cases where the defendant is a veterinarian) and may therefore lodge a claim under both theories. If the animal's owner bases her claim on breach of contract, the sentimental value of the animal to the keeper may also be recovered, due to the reference in Article 99 para. 3 (contractual liability) to Article 43 (para. 1bis) of the Swiss CO.

D. Allocation of Animals in Divorce Cases – Whose dog will it be?

1. Introduction

Many parties who file for divorce or dissolution of a registered partnership[154] are pet owners. Some of the couples will be able to agree on the division of marital assets and ownership structures as well as the eventual allotment of the animal between themselves. All a court will have to do is review the settlement agreement the parties have reached. But if both parties claim exclusive ownership of the pet, it will be the court's task to make a determination as to who is the legal owner of the companion animal and in cases of jointly owned animals (shared ownership),[155] it must also be ruled with whom the animal is supposed to live in the future. Swiss law holds, in Article 651a of the CC, that in case of dispute over ownership issues of jointly owned companion animals, the shared ownership must be abolished and the title vested in one party only. Thereby it is decisive which party, with regards to animal protection, ensures the better accommodation of the animal.[156] After

[153] Federal Supreme Court of Switzerland decision No. 5P.91/2004 of 24 September 2004.

[154] In Switzerland, same-sex partnerships can be registered federally since a federal government-proposed partnership law was approved by referendum by the Swiss, which was put into effect on 1 January 2007, *see* SR No. 211.231 "Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz, PartG)."

[155] With regards to shared ownership (in German: 'gemeinschaftliches Eigentum' – which might not be exactly the same as U.S. 'joint ownership' therefore this term will be used loosely or avoided completely), Swiss law of property differentiates between co-ownership (in German: 'Miteigentum', Articles 646-651a Swiss CC), and ownership in common (in German: 'Gesamteigentum', Articles 652-654 Swiss CC). Co-owners share a thing by fractional shares while owners in common own a thing as a whole together. Contrary to co-owners, owners in common are joined in a community either by operation of law or by contract (e.g. all the rights and obligations comprised in an inheritance constitute common property until partition), cf. Peter Tuor, Bernhard Schnyder, Jörg Schmid & Alexandra Rumo-Jungo, Das Schweizerische Zivilgesetzbuch (Zurich 2009), at 827.

[156] During divorce proceedings, the judge may have to decide with whom the animal should live until it decrees the divorce. This is not yet a question of ownership but temporary allocation of property. The issue will be raised in connection with the detailed discussion of Article 651a of the Swiss CC.

determining that a companion animal is jointly owned, several issues must be addressed: What is the meaning of 'better accommodation of the animal'? Does the party who loses his property rights have to pay maintenance for the companion animal? Does he have a claim for compensation and can the judge award visitation rights? And what happens with jointly owned commercial animals? These are some of the issues which will be discussed in the following.

2. Determination of Ownership Structure

As discussed, animals are in most instances treated like property under the law. Therefore, a companion animal would basically be treated like household goods which are the epitome of the family property and which must be divided up in the case of a divorce and/or dissolution of a registered partnership.[157] According to the Swiss matrimonial property system, in a first step the parties take back what is their separate property, examples include Article 205 para. 1 Swiss CC – participation in acquisitions and Article 242 para. 1 Swiss CC – community of property; the same applies to the marital state of separation of estates,[158] the latter ordinarily also applies to registered partnerships, see Article 18 of the Swiss PartG. According to the rules of evidence the claimant bears the burden of proof of sole ownership.[159] As a matter of fact, in the married state or in a registered partnership it is sometimes not easy to give proof of exclusive ownership. In Switzerland, there is a presumption of ownership if a movable chattel is in the sole possession of a party.[160] Possessor is he who has the effective control over something.[161] However, according to the doctrine, the presumption stated in Article 930 para. 1 of the Swiss CC does not apply to persons living in the same household since the property situation is not compelling for the ownership title during matrimony or partnership respectively.[162] Household pets often have no exclusive caregiver because both parties have the animal in their possession at one time or another and finance and care for it together. In such cases, it has to be presumed that both parties have effective control over

[157] Andrea Büchler & Heinz Vetterli, Ehe Partnerschaft Kinder (Basel 2007), at 59, 90. As we have discussed earlier, the law states that animals are not objects but it rules also that the provisions for objects apply where there exists no special regulation for animals (Article 641a of the Swiss CC). *See* for a discussion of animals and household goods; Myriam Grütter & Daniel R.T. Trachsel, Aktuelle Aspekte des Eheschutzes, FamPra.ch 4/2004, at 858, 864, *see also* Rolf Vetterli, in: Ingeborg Schwenzer, Scheidung, Commentary, Vol. I (2nd ed. Bern 2011), Article 176 Swiss CC para. 19.

[158] Büchler & Vetterli, *supra* note 157 at 82. (Participation in acquistions is the ordinary matrimonial property system in Switzerland. However, the marital estate will be governed by the system of community of property or separation of estates if the parties provided so in a marriage covenant.).

[159] Article 8 Swiss CC; Article 200 para.1 Swiss CC - participation in acquisitions; Article 226 Swiss CC - community of property; Article 248 para.1 Swiss CC - separation of estates.

[160] Article 930 para.1 Swiss CC.

[161] Article 919 para. 1 Swiss CC.

[162] Emil W. Stark & Wolfgang Ernst, in: Heinrich Honsell et al. , Basler Kommentar zum Schweizerischen Privatrecht (Basel 2007), at Article 930 Swiss CC para. 11 et seq.; Heinz Hausheer & Regina Aebi-Müller, in: Heinrich Honsell et al., Basler Kommentar zum Schweizerischen Privatrecht (Basle 2007), at Article 200 Swiss CC para. 13.

the companion animal and are therefore both possessors. Shared possession leads to the presumption of shared ownership. Corresponding to these general rules, the law presumes shared ownership in the area of marital property law, if the proof of sole ownership fails.[163]

In the case of companion animals which live outside the marital home, the circumstances are generally clearer, especially if one party financially supports and cares for the animal alone. One example is the horse which is placed in a horse barn nearby and one party only is responsible for the animal's basic daily needs (like physical care, exercise, or grooming).[164] Sole proprietorship and thereby exclusive ownership can also be assumed for animals which have been acquired before marriage or have been bestowed upon one party only or have been inherited during the marriage or registered partnership.

Where the proof of sole ownership fails or it remains unclear which of the parties is exclusive owner of a companion animal, it is assumed according to the Swiss CC that the animal is owned by both spouses/partners jointly.[165] If the spouses are unable to reach an amiable property division agreement between themselves, the court must decide which party is better suited to look after the animal in the future and allocate ownership accordingly.

3. Allocation of Companion Animals decreed by the Court

3.1 Applicable provisions

In a divorce case or dissolution of a registered partnership, objects in shared ownership will be divided up according to the general rules applicable to the dissolution of co-ownership or ownership in common. Accordingly, where the owners cannot agree on the method of division, the court will order the division in kind if the joint object is capable of being divided without reducing its value considerably or the auctioning off of the object among the co-owners. The court may also have the object publicly auctioned.[166] Meanwhile the laws governing matrimonial property law and registered partnerships provide a further method of division: the allocation of exclusive ownership onto one of the spouses or partners against full indemnification of the other one, provided that a predominant interest can be proved by the party claiming that interest.[167] These rules will apply to objects as well as commercial animals.[168] Non-commercial animals however will be allocated to the party who, with regards to animal welfare, offers the best accommodation for

[163] *See* Article 200 para. 2 Swiss CC - participation in acquisitions; Article 248 para. 2 Swiss CC - separation of estates. *See also* Stark & Ernst, *supra* note 162, at Article 930 Swiss CC para. 12.
[164] Reto Gantner, Die Zuteilung von Haustieren im Scheidungsverfahren, FamPra.ch 2001, 20 at 31 (This paper discusses the legal situation before the introduction of Article 651a into the law).
[165] Stark & Ernst, *supra* note 162, at Article 930 Swiss CC para. 12.
[166] Article 651 para. 1 and 2 Swiss CC.
[167] *See also* Article 205 Swiss CC - participation in acquisitions
[168] *See* Article 641 para. 2 Swiss CC.

the animal.[169] This rule will be discussed in detail next.

3.2 Article 651a Swiss CC in particular

a. Preconditions

Article 651a of the Swiss CC holds the following concerning the allotment of jointly owned companion animals:

> 1 Animals which are kept within the domestic range and not as assets or for the purpose of earning money, the Court, in the case of dispute, assigns the animal to that party as sole owner that, with regard to animal protection, ensures the better keeping of the animal.
> 2 The Court can oblige the person to whom the animal is assigned to pay the other party an adequate compensation; the Court fixes the respective amount at its own will.
> 3 The Court makes the necessary precautionary arrangements, in particular as regards the provisional placement of the animal.[170]

In essence, Article 651a of the Swiss CC states the following: firstly, there must be an animal which is kept within the domestic range and not as a commercial animal. Secondly, as a result of the systematic position of the provision within the Civil Code it crystallizes that the owners of the animal must share ownership (that is, they must be co-owners or owners in common).[171] Thirdly, both parties must claim exclusive ownership and lastly, there must be at least one party who guarantees an accommodation of the companion animal in compliance with Switzerland's animal protection laws.

First of all, Article 651a of the Swiss CC is only applicable if the animal in question is a companion animal in the sense of the law as defined above (see B). Secondly, the law presupposes a 'dispute' over the allocation of the animal. The law stipulates further that that party shall be awarded exclusive ownership who guarantees a better keeping of the companion animal with regards to animal protection. According to the legislative materials, an animal's welfare encompasses not only its physical needs (e.g. basic daily needs including medical care) but also

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[169] Article 651a Swiss CC.

[170] S. Wyler & B. Wyler, *supra* note 124 at 182. In German: „Tiere des häuslichen Bereichs [1] Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, spricht das Gericht im Streitfall das Alleineigentum derjenigen Partei zu, die in tierschützerischer Hinsicht dem Tier die bessere Unterbringung gewährleistet.
[2] Das Gericht kann die Person, die das Tier zugesprochen erhält, zur Leistung einer angemessenen Entschädigung an die Gegenpartei verpflichten; es bestimmt die Höhe nach freiem Ermessen.
[3] Es trifft die nötigen vorsorglichen Massnahmen, namentlich in Bezug auf die vorläufige Unterbringung des Tieres."

[171] Antoine F. Goetschel & Gieri Bolliger, Das Tier: Weder Sache noch Mensch, plädoyer 4/04, at 27.

its psychological well-being. In other words, the relationship between companion animal and human caregiver from the animal's perspective is a very important factor in the weighing of this issue. Contrary to Article 43 para. 1bis of the Swiss CO, where the extent of the emotional value of a companion animal to its caregiver must be determined, it is the animal's best interest which counts here. The legislative materials state quite clearly that the relationship shall be analyzed exclusively in the *animal's interest*.[172] Thus, the constitutionally guaranteed dignity of an animal is substantiated in the private law.[173] Bearing these issues in mind, one concludes that the courts must weigh both the physical as well as the psychological well-being of the companion animal from the companion animal's point of view. Accordingly, both objective and subjective criteria have to be contemplated. Additionally, we are of the opinion that in order to apply Article 651a of the Swiss CC at least one party must be in a position to accommodate the animal in compliance with our animal protection laws.

There is no room for doubt that the physical well-being influences the emotional well-being of humans and animals quite considerably.[174] Correspondingly, in order to determine what is in the animal's best interest with regards to accommodation, in a first step, the following issues have to be weighed: who can best pay attention to the animal's basic needs such as food, species-appropriate accommodation, exercise, play, and grooming. Switzerland's animal protection law and by-law substantiate the meaning of the said criteria from the standpoint of law. The applicable provisions stipulate for instance that social animals shall not be kept alone and therefore the division of several animals of the same kind could violate Switzerland's animal protection laws. Let us illustrate this issue as follows: a couple keeps two guinea pigs or two pet rabbits of which they share ownership. The couple files for divorce and both partners claim sole ownership of the animals. It would seem easy to resolve this issue: award one of the animals to each of the spouses. But in Switzerland, because it is scientifically proven that guinea pigs and rabbits – among other animal species – are social creatures, the law stipulates that they need a social partner of the same species in any case, because only a partner of the same species guarantees their emotional well-being. Therefore, concerning Article 651a of the Swiss CC, a split-up of said animals between the parties in order to assign sole ownership of one animal alone to each of the spouses would be out of the question.[175]

Other factors that have to be considered are: The environment of the parties, which means their age, health, mobility, family situation, living quarters, along with other concerns discussed in the following paragraph. Obviously, all these factors depend on the particular animal species. And last but not least, the judge

[172] *See* Parliament Initiative, *supra* note 122, at 4171.
[173] Grütter & Trachsel, *supra* note 157, at 863.
[174] *See also* Ombline de Poret, Le statut de l'animal en droit civil (Zurich 2006), at para. 1013.
[175] Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 241; Gantner, *supra* note 164, at 34 (There is a discussion of the case of two singing birds which would stop singing if they were separated.).

has to contemplate the financial situation of the parties to the dispute (see below). However, monetary considerations should generally not be decisive.

As we have addressed above, the legislator acknowledged that emotional aspects have to be weighed in order to guarantee an animal's best interest. Just like any other living being, companion animals develop special relationships to humans and other animals. In this context it is quite probable that a companion animal developed a strong emotional attachment to one of the parties and/or other household pets or the family's children. A separation from these 'partners' will most likely affect its feelings adversely and result in detriment of the companion animal's emotional well-being.

In many cases, the primary caregiver is the person with the greatest emotional attachment to the animal and vice versa. But what should happen if this person is not the one with the greatest ability to financially support the animal? This is left to the judge to weigh out in an equitable manner. Because the emotional well-being advances the physical health, a strong emotional bond has to be given priority, as long as the financial situation of the party does not make it impossible from an objective point of view to maintain and care for the animal properly.[176]

b. Consequences

Taking into consideration all of the above facts, the court appraises the evidence freely and assigns the companion animal to the party who is best suited to care for the animal with regards to animal welfare. If the judge comes to the conclusion that none of the parties will be able to offer an adequate accommodation, the general rules regarding the cancellation of shared ownership will likely be applied and consequently, the animal will be auctioned off or sold.[177]

The law stipulates that the judge can order the party who attains exclusive property of the animal to pay the other party an indemnification.[178] The amount of this indemnification is left to the discretion of the judge who must base his decision on principles of justice and equity.[179] Due to the wording of the applicable provision some commentators are of the opinion that the granting of an indemnification is in fact optional.[180] However, it has to be considered that one party loses her rights to the companion animals by court order and not voluntarily. Moreover, in the realm of matrimonial property law, one spouse has to be fully indemnified if exclusive ownership of an object is allocated to the other spouse because he could prove a predominant interest.[181] There is no valid reason why an animal owner should in this respect be treated any different to the owner of a piece of furniture.[182] Therefore

[176] *See also* de Poret, *supra* note 174, at para. 1012 et seq.
[177] De Poret, *supra* note 174, at para. 1015 et seq.
[178] Article 651a para. 2 Swiss CC.
[179] Article 4 Swiss CC.
[180] *See also* de Poret, *supra* note 174, at para. 1035.
[181] Article 205 Swiss CC.
[182] This is also the opinion of Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243.

the indemnification is mandatory except in cases where the dispute was started arbitrarily in order to hassle the other party.

The text of the law mandates further that the indemnification must be reasonable. 'Reasonableness' in this context means according to the legislative materials that the legislator wanted the judge to take into consideration the objective value of the companion animal.[183] In doing so the judge might for instance consider the replacement value[184] of the companion animal but not a sentimental value.

However, in most cases the sentimental or emotional value of a companion animal to its owner is considerably higher than the objective or replacement value. In practice, apart from pedigree dogs or cats most companion animals do not have any market value whatsoever. Consequently, the judge could only award a nominal amount for compensation. But was it truly the intention of the legislator that most animal owners will have to leave the courtroom almost empty handed?

The answer has to be a definite no. In Switzerland, the emotional bond between animal and keeper – or owner, as the case may be – is recognized as a right worthy of protection. Additionally, in the realm of tort law, the relevant provision rules that the sentimental value of an animal to the keeper is a real albeit non-pecuniary value, which has to be compensated if a companion animal is injured or killed.[185] In this respect it seems unfortunate that Article 651a Swiss CC does not order the judge to take into consideration the sentimental value of an animal to its owner when determining a reasonable indemnification.[186] However, there are two faces of the same coin: because the law does not prescribe any factors to the judge to consider, she should be at liberty to consider both objective and sentimental value of the animal to the owner. Besides, despite the fact that the law foresees an indemnification, most parties will only receive a nominal amount of money if the animal's objective value is the only factor to be taken into consideration. It is very difficult indeed to imagine that this result was the intention of the legislator. A person who loses any rights with regards to the companion animal will be punished doubly because he will not receive any indemnification to speak of. Therefore, we advocate that a proven sentimental value must be considered by the court when awarding an indemnification.[187]

c. Precautionary Measures

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[183] *See* Parliament Initiative, *supra* note 122, at 4171.

[184] Christoph Brunner & Jürg Wichtermann, in: Heinrich Honsell et al., Basler Kommentar zum Schweizerischen Privatrecht (Basel 2007), at Article 651a Swiss CC para. 7; De Poret, *supra* note 174, at para. 1029.

[185] *See* Article 43 para. 1[bis] Swiss CO and *supra* sec. 1.3.

[186] This is probably why de Poret, *supra* note 174, at para. 1031 comes to the conclusion that a sentimental value of the animal to the owner is not one of the factors the judge should consider.

[187] An opinion, which is similarly advocated by Brunner & Wichtermann, *supra* note 184, at Article 651a Swiss CC para. 7. These authors ask for a modest consideration of the sentimental value while Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243, advocate for a consideration without mentioning any restrictions regarding the level of indemnity.

From the date the litigation is pending on, the court can order the necessary provisional measures. The law only mentions the provisional placement of the companion animal without restricting the circle of possible measures. Further arrangements might include visitation and monetary support or maintenance payments. Precautionary measures can be ordered during the divorce procedure as well as the procedure leading to the dissolution of a registered partnership.[188]

During the divorce procedure, or the procedure to dissolute a registered partnership, ownership is not the decisive factor for assigning temporary custody of a companion animal. The custody of a commercial animal will be awarded to the party to whom the animal is more useful or who provides evidence of a preponderant interest, for example, to the person who needs the animal for his professional endeavors such as his job as a police officer or farmer. But if the animal is classified as a companion animal, the essence of Article 651a Swiss CC has to be taken into account. Because this provision concretizes the constitutional principle of dignity of the creature, the animal welfare takes in any case precedence over the interests of a party in case of a clash of interests. The judge must therefore assign the temporary custody of the animal to that party who guarantees a better accommodation of the animal. At that point it is also conceivable to place the animal in a shelter if this solution is more beneficial to the animal's welfare,[189] or even to award the parties joint custody.[190]

4. Particular Points of Interest

4.1 Visitation

During the court procedure, the parties remain joint owners of the companion animal even if custody is awarded only to one between them. Accordingly, most authors support a visitation right of the other party.[191] But once the shared ownership of property by the parties is abolished and one party is awarded exclusive ownership, the situation is different. Because there is a lack of statutory authority to support a visitation right,[192] it is not possible for the court to incorporate a visitation order into a divorce decree.[193] The only way is for the parties to draw up an arrangement for visitation outside of court, leaving contractual remedies available.[194]

4.1 Monetary Support to the Exclusive Owner

[188] Article 276 of the Swiss Civil Procedures Law ("Zivilprozessordnung", SR 272) and Article 307 in connection with Article 276 Swiss Civil Procedures Law.
[189] Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243; de Poret, *supra* note 174, at para. 1052 et seq.
[190] Gantner, *supra* note 164, at 29 (refers to the Federal Supreme Court of Switzerland's decision No. 119 II 193 (shared use of a holiday residence during divorce procedure)).
[191] Goetschel & Bolliger, *supra* note 171, at 27 et seq.; Gantner, *supra* note 164, at 29; de Poret, *supra* note 174, at para. 1058; Vetterli, *supra* note 157, at 299 (different opinion).
[192] The question was discussed during the lawmaking process but was later dismissed. *See* de Poret, *supra* note 174, at para. 1066 (fn. 946).
[193] *See* Gantner, *supra* note 164, at 30.
[194] De Poret, *supra* note 174, at para. 1063 et seq. with further references.

a. Pending Court Action

The law is also silent with regards to maintenance payments. As we have disucussed, during the divorce proceedings and the proceeding for the dissolution of a registered partnership both parties remain owners of the companion animal. Therefore, concerning monetary support, the general provisions regarding co-ownership and ownership in common have to be consulted. In the absence of an agreement to the contrary, co-owners have to bear the costs of administration, taxes and other charges arising from co-ownership or burdening the co-owned property in proportion to their shares.[195] In contrast, the rights and duties of owners in common are determined by the rules of the statutory or contractual community in which they are joined.[196] Furthermore, the judge can order the necessary precautionary measures which can include maintenance payments.[197] As a result, one party can be ordered to pay monetary support to the custodial guardian until the shared ownership is cancelled.[198]

b. After dissolution of the Shared Ownership

According to the provisions regulating property and family law, a party who is awarded exclusive ownership after the dissolution of co-ownership or ownership in common has no right for compensation for the maintenance costs of an object. For instance, if in the realm of matrimonial property law, a co-owned car is undividedly allotted to one party because she proves a preponderant interest in the car that party cannot claim monetary support for the maintenance of the car. Switzerland's property law statute does not contemplate support for personal property. The same is true for a companion animal which is assigned to one of the joint owners. There simply is no statutory authority for such payments. However, in the case of divorce or dissolution of a registered partnership it should be possible to include the maintenance costs for an animal in the monetary support as one of the ex-spouses has to pay to the other one under certain conditions.[199]

Swiss law assumes in a general fashion that both spouses are responsible for their own maintenance after the dissolution of a marriage (principle of a 'clean break'). If, however, one spouse cannot be expected to provide for proper maintenance, inclusive of an equitable provision for old age by herself, the other spouse has to contribute an adequate amount to her means (principle of solidarity

[195] Article 649 para. 1 Swiss CC.
[196] Article 653 Swiss CC.
[197] Article 651a para. 3 Swiss CC.
[198] Goetschel, Bolliger, Richner & Spring, *supra* note 63, at 243; de Poret, *supra* note 174, at para. 1054 (more restrictive).
[199] *See* 'maintenance after the marriage', Article 125 Swiss CC. The maintenance payments of one registered partner to the other will not be discussed in this paper; however, the method of calculation is very similar to maintenance after the marriage. *See* Ingeborg Schwenzer, in: Andrea Büchler (ed.), Eingetragene Partnerschaft. Kommentar (Bern 2007), at Article 34 Swiss PartG para. 40.

after marriage). In determining a proper award of maintenance Switzerland's private law requires the judge to consider a list of factors when deciding the issue of maintenance payments.[200] Commentators discuss various methods of calculation, but in the majority of cases the following method is applied: first, the minimum income needed to exist is calculated according to the method developed in the field of debt recovery and enforcement for both parties; second, this is calculated for the family; if there remain any surplus funds, both parties are entitled to participate therein.[201]

According to the Federal Supreme Court of Switzerland, the amount necessary to maintain an animal is included in the amount a debtor retains for cultural activities and hobbies and not added to the cost of living, if, for instance, his wages are attached.[202] Many authors in the doctrine speak out against this conception.[203] Because the emotional bond between animal and keeper is recognized as a right worthy of protection in Switzerland, and the keeping of a companion animal is for many people a basic social need, the concrete costs for the maintenance and care of an animal should be allowed for in the cost of living and not included in the basic amount for 'cultural activity' where the minimum income needed to exist has to be calculated. Because the minimum income needed to exist is the basis for the calculation of maintenance payments after marriage, the maintenance costs for animals should be automatically included in the monetary support one ex-spouse has to pay to the other. In one of the Swiss Cantons, the Canton of Solothurn, this has already become reality.[204] Hopefully, this example will set a precedent.

[200] *See* Article 125 para. 2 of the Swiss CC.

[201] Ingeborg Schwenzer, in: Ingeborg Schwenzer, Scheidung. Kommentar (Bern 2005) at Article 125 Swiss CC para. 75 et seq.; Heinz Hausheer, Thomas Geiser & Regina Aebi-Mueller, Das Familienrecht des Schweizerischen Zivilgesetzbuchs (4th ed. Bern 2010), at para. 10.123 et seq.

[202] *See* Federal Supreme Court of Switzerland decision No. 128 III 337, at 338: claimant filed a lawsuit for 500 Swiss Francs (costs of accommodation for 19 parrots). *See also* Parliament Initiative, *supra* note 122, at 4173 (where companion animals are qualified as a 'hobby').

[203] *See* Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243; Goetschel & Bolliger, *supra* note 171, at 27 (implicitly); Catherine Strunz, Die Rechtsstellung des Tieres, insbesondere im Zivilprozessrecht (Zurich 2002), at 66; Bernhard Isenring, Das Haustier in der Zwangsvollstreckung, Blätter für Schuldbetreibung und Konkurs 2004, at 41 et seq.; Vetterli, *supra* note 157, at 299. For a different opinion, *see* de Poret, *supra* note 174, at para. 1087 et seq.; Gantner, *supra* note 164, at 30.

[204] Appellate Court of the Canton of Solothurn, Supervisory Authority for Debt Recovery and Enforcement (in German: 'Obergericht Solothurn, Aufsichtsbehörde für Schuldbetreibung und Konkurs'), 8 December 2004, SOG 2004 No. 9 (SO), Schweizer Juristen Zeitung (SJZ) 102 (2006), 285 et seq.

E. The Animal in the Law of Inheritance

1. Introduction

In Switzerland, animals are part of a deceased person's estate due to their lack of legal personhood. Because they are regarded as a piece of property, the deceased's animals will be distributed amongst the heirs just like any other object if he dies intestate. However, if the said animal qualifies as a companion animal, and there is discord amongst the heirs concerning the allocation of the animal, the rule of allocation in Article 651a of the Swiss CC will apply. Like in the U.S., in Switzerland, animals have neither the capacity to be heirs nor legatees. But in many instances, especially the owners of companion animals may wish to make sure that their pets will be cared for upon their death. In order to make this happen, a testator has the instruments of 'burdens and conditions', which means that she can attach burdens or conditions to her testamentary dispositions (wills or testamentary pacts). Furthermore, the testator has the ability to establish a foundation.[205]

2. Allotment of Animals

Under Swiss law, the heirs acquire all assets and all liabilities of the deceased at the moment of death. Where there are several heirs, they share ownership of the property forming part of the estate. The Community of the heirs is an example of ownership in common as per Swiss CC Articles 653 et seq., because the heirs form a simple partnership (in German: 'Einfache Gesellschaft') until the estate has been divided according to the applicable rules. Each heir has the right to demand the partition of the estate at any time.[206] In the absence of a disposition to the contrary, the heirs have equal rights to the objects which are part of the inheritance.[207] Assuming that the co-heirs cannot agree on the allotment of an animal, which is part of the estate, one of the following procedures will apply, depending on the qualification of the animal as commercial or non-commercial.[208] Commercial animals will be allocated according to the general rules of the law of inheritance. Thus, the heirs have to divide the estate into as many shares or lots as there are heirs entitled.[209] If they cannot agree on the distribution of the lots amongst themselves, lots will be drawn. Consequently, neither the relationship between heir and animal nor the heir's capacity to care for the animal will be considered. However, if the animal in question is a companion animal according to the law, Article 651a of the Swiss CC will apply and thus the rule that the animal's best interest with regards to animal welfare will be decisive.[210]

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[205] The law of inheritance is very complex. Therefore, only general remarks can be made within the scope of this paper.
[206] Article 604 para. 1 Swiss CC.
[207] Article 610 para. 1 Swiss CC.
[208] If none of the heirs wishes to adopt the animal, it will be sold or given away; *see* Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 191; *see also* de Poret, *supra* note 174, at para. 887.
[209] Article 611 para. 1 Swiss CC.
[210] *See* Parliament Initiative, *supra* note 122, at 4171. *See also* de Poret, *supra* note 174, at paras.

3. Testamentary dispositions

3.1. Overview

Under Swiss law, descendants, spouses and parents are statutory heirs who are protected by the mandatory rules on statutory legal portions. For this reason, a person can only dispose of his whole estate at his discretion if there are no statutory heirs. As the case may be, the testator can institute one or several heirs for the whole or for only a part of the inheritance[211] or leave a beneficiary a legacy of some of his property.[212] To both of these dispositions burdens or conditions can be attached. Where a testator owns one or more animals he has the possibility to attach the burden (charge) to care for the animal to the inheritance or to the legacy.

3.2. Burden to care for an animal

The testator determines the content of the charge within the framework of the legal permissability himself.[213] His directions can either be very specific, the testator might leave detailed instructions regarding food, housing, or medical care; or just very basic instructions. It is sufficient to say: 'I charge my son Peter with the burden to care for my dog, Stanley'. In this case, the type of care desired is not specified and Peter should care for Stanley, the dog, in accordance with the requirements of the Animal Protection laws.[214] However, he should also consider the hypothetical will of the deceased concerning the type of care desired for the pet and the amount of money involved. In any case, the burden must be formulated precisely in order to be enforceable by law. Nevertheless, the cautious phrasing 'I beg my heirs to look after my dog' can be qualified as a burden for the heirs to personally care for the dog or arrange for a third party to do so.[215]

Of course it is possible to attach a burden to the inheritance as a whole. In this case all of the co-heirs are responsible for the enforcement of the burden; however, they can delegate the task to one individual heir or a third party.[216] We think that for practical reasons it makes more sense to attach the charge to one single disposition, or in other words, to charge only one heir or legatee to look after one's animal and to inform this person accordingly so that she can prepare herself for the task.

849, 970 et seq., where the applicable proceeding is discussed in detail.

[211] Article 483 Swiss CC.

[212] Article 484 Swiss CC.

[213] An immoral or illegal charge or condition makes to disposition itself null and void (Article 482 para. 2 Swiss CC). Furthermore, the execution of the provision must be feasible and must not harm the heir's individual inherent rights (Article 27 Swiss CC). Cf. Paul-Henri Steinauer, Le droit des successions (Bern 2006), at para. 599 et seq.

[214] *See* de Poret, *supra* note 174, at para. 468 et seq.

[215] Peter Breitschmid, Roland Fankhauser, Thomas Geiser & Alexandra Rumo-Jungo, Erbrecht (Zurich 2010), at 74, citing the Federal Supreme Court of Switzerland's decision No. 90 II 476, at 482 (in this case the testator formulated a 'wish' concerning the use of a house).

[216] De Poret, *supra* note 174, at para. 478 et seq.

The burden exists as long as the specific animal lives. According to Article 482 para. 1 of the Swiss CC all interested parties – therefore also e.g. a Society for the Prevention of Cruelty to Animals – can call for the enforcement of the burden as soon as the disposition itself takes effect. In order to make sure that the burden will be enforced correctly, it is advisable to appoint one or more persons who have legal capacity to execute the testator's last will.[217]

3.3. Provisions for animals in last wills

It has already been pointed out that animals cannot be heirs or legatees. However, it is not uncommon for people to include their animals in their wills. Under the former legal situation (until the end of March 2003) such dispositions would have been considered senseless or vexatious to other persons and thus held to be non-existent.[218] In order to clarify the situation, Article 482 para. 4 has been introduced into Switzerland's Civil code. This provision is a rule of interpretation and holds that an inclusion of an animal in a will must be converted into a burden to care for the animal:[219] "Where an animal is considered in the will, the respective disposition implies that the animal must be cared for as is appropriate for an animal."[220] Contrary to Article 651a of the Swiss CC, Article 482 para. 4 does not stipulate a limited applicability of the law only to companion animals. Correspondingly, the statutory provision is applicable in any case where an animal is considered in a will as long as the execution of the burden is possible.[221] In such cases the deceased did of course not charge an individual heir or legatee with the burden to care for the animal because in his eyes, the animal itself is the heir. As a result of the conversion of the institution of the animal as heir to a charge to care for the animal, the community of the heirs as a whole will be charged with the burden (which they can, again, delegate). Furthermore it can be assumed that the testator did not leave instructions regarding the care desired for the animal. His provision might simply state 'My cat Muffy shall inherit 10'000 Swiss Francs'. Hence, the burdened heirs have to care for the animal in accordance with Switzerland's animal protection laws, also considering the standard of care the animal received from the hands of its owner (as long as this standard was higher than the basic requirements of the animal protection laws) and the amount of money 'left' to the animal.[222] As

[217] Article 517 Swiss CC et seq.; Steinauer, *supra* note 213, at para. 1159 et seq.
[218] Stephanie Hrubesch-Millauer, in: Marc Amstutz et al. (eds.), Handkommentar zum Schweizer Privatrecht (Zurich 2007), at Article 482 Swiss CC para. 8.
[219] *See* Parliament Initiative, *supra* note 122, at 4169.
[220] S. Wyler & B. Wyler, *supra* note 124, at 141. In German: „Wird ein Tier mit einer Zuwendung von Todes wegen bedacht, so gilt die entsprechende Verfügung als Auflage, für das Tier tiergerecht zu sorgen."
[221] *See* e.g. de Poret, *supra* note 174, at para. 581.
[222] *See* Steinauer, *supra* note 213, at para. 590a (concerning the question what should happen if the inheritance does not consist of an amount of money but of an object, such as a house.) – According to Ombline de Poret, successio 2008, at 125, the only guideline the heirs have to consider are Switzerland's animal protection laws.

is the case with burdens stipulated by the testator, interested parties again have the possibility to demand enforcement of the burden which came into existence by legal conversion.[223]

4. Foundations

Switzerland's laws provide the possibility for a testator to constitute a foundation upon his death: "[1] The testator can devote the whole or any part of the devisable portion of the estate for some special purpose by way of a foundation. [2] But the foundation is valid only where it satisfies the requirements of the law."[224] The question has been raised whether it is viable to create a foundation in favour of one single animal. In order to answer this question, attention must be given to the provisions regulating foundations in Swiss law, that is, Articles 80 et seq. of the Swiss CC.

In Swiss Foundation law there exist the basic principle of foundation or founder freedom which encompasses the freedom of every person to formulate a foundation and to shape it with regards to its specific purpose, funds and organisation in accordance with Switzerland's laws.[225] From a legal perspective, the constitution of a foundation for the care of a designated animal is in principle valid. However, according to the doctrine, the set-up of such a foundation is not considered to be sensible. It is argued that the purpose is too restrictive and the duration of the foundation which corresponds to the duration of the animal's life is in many cases too short. Moreover, despite its narrow and private purpose, the foundation would be subject to the supervision of the administrative body of the Swiss Confederation, Canton or Comune with which its object is connected.[226] One commentator suggests therefore to set-up a foundation with two concurrent or successive purposes. It would thus be possible to choose as primary purpose the monetary support of an animal which would be replaced by another purpose upon the animal's death. The second purpose could consist in another specific charitable purpose such as the care for stray cats. Through the selection of two purposes, one of which is wider and not restricted by time, the aforementioned objections to foundations in favour of one animal could be rebutted.[227]

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[223] *See* Parliament Initiative, *supra* note 122, at 4169.

[224] Article 493 Swiss CC. In German: „[1] Der Erblasser ist befugt, den verfügbaren Teil seines Vermögens ganz oder teilweise für irgend einen Zweck als Stiftung zu widmen. [2] Die Stiftung ist jedoch nur dann gültig, wenn sie den gesetzlichen Vorschriften entspricht." *See* S. Wyler & B. Wyler, *supra* note 124, at 143.

[225] Harold Grüninger, in: Heinrich Honsell et al., Basler Kommentar zum Schweizerischen Privatrecht (Basel 2007) at Vor Artikel 80-89[bis] Swiss CC para. 6 et seq.; Federal Supreme Court of Switzerland, decision No. 127 III 337, at 340.

[226] *See* de Poret, *supra* note 174, at para. 720 et seq.; de Poret, *supra* note 222, at 126. *See also* Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 198.

[227] De Poret, *supra* note 174, at para. 722 et seq.

IV. Summary

The situation of animals in Swiss law is at one and the same time a matter of progress and regress in the effort to improve not only the legal position of animals but the protections afforded them by the law. Abolition of the *Tieranwalt* (Animal Attorney) of the Canton of Zurich after over twenty years of successful activity shows that reforms and innovations must be constantly defended and can never be taken for granted.

Swiss law has hitherto afforded no recognition to the subjective rights of animals, but it has extended recognition to certain interests that have been deemed worthy of protection – in particular, the interest of not having to suffer is protected within a certain framework. Furthermore, there is a fundamental albeit imperfectly realized recognition of the idea of the ethical protection of animals;[228] that is to say, the notion of protecting animals as living and sentient beings for their own sake alone[229] and not for the sake of human beings. As early as 1989, in a leading case, the Swiss Federal Supreme Court established that "the ethical protection of animals . . . recognizes animals to be living and feeling fellow creatures for whom respect and appreciation on the part of intellectually superior humans is a moral postulate."[230] By virtue of the recognition of the dignity of the Creature in the Swiss Federal Constitution, this principle was lent additional weight and must now be taken into consideration in any interpretation of legal norms.

As a result, Swiss legislation also recognizes the inherent value of animals beyond their practical utilization by human beings – as the Swiss Federal Council explicitly held to be the case in its remarks pertaining to the new Animal Protection Act and thus, according to its own statement, taking the first step toward recognition of an independent right to existence for animals.[231] There is naturally still a long way to go until this final goal is reached. It was in this regard that in 1992 the Business Review Commission of the Upper Chamber reproved the instrumental relationship to animals, which is frequently encountered in the agricultural sector and which can best be summarized with the concept of "animal production";[232] another highly problematic instance of the exclusive instrumental use of animals is the employment of animals in experiments.[233] The next logical step along the path toward an independent right to existence for animals is the recognition of a right to life for animals and expansion of their protection against suffering.

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[228] The term „ethical protection of animals" is discussed in detail by Albert Lorz & Ernst Metzger, Tierschutzgesetz, Kommentar, 6th ed., München 2008, para. 26, para 60 et seq.; Binder & von Fircks, *supra* note 89, Anmerkungen zu § 1.

[229] Cf. report of the Business Review Commission of the Upper Chamber on „enforcement problems in animal welfare, *supra* note 55, at 621; Antoine F. Goetschel & Gieri Bolliger, Das Tier im Recht, Zürich 2003, at 198.

[230] Swiss Federal Supreme Court, decision No. 115 IV 248 et seq.

[231] Botschaft Tierschutzgesetz, *supra* note 7, at 663; Business Review Commission of the Upper Chamber on "enforcement problems in animal welfare," *supra* note 55, at 622.

[232] Business Review Commission of the Upper Chamber on "enforcement problems in animal welfare", *supra* note 55, at 622 et seq.

[233] *See also* Brenner, *supra* note 41, at 171 et seq.

Concerning the emotional relationship between humans and companion animals, their respective interests are protected by several provisions in Swiss private law. Statutory law not only stipulates that non-human animals are not things, but places special emphasis on their well-being when their owners separate, divorce, or die. On the other hand, a human beings' special interest in a companion animal is protected when his or her pet is injured or killed. Not only does the law acknowledge that non-commercial animals have a sentimental value to their owner and mandates its compensation in the realm of tort and contract law but it also allows a judge to award veterinary expenses that are higher than the animal's replacement value. These legal changes are a major step forward. However, it is in any case unfortunate that the so-called change in the animal's legal status did not result in the introduction of a theoretically conclusive separate legal category for non-human animals and Swiss law continues to distinguish between 'objects' and 'subjects' or 'things and 'persons' respectively, bestowal of this latter status restricted to human beings.

There is yet still much work to do at both the political and legal levels in order to finally achieve a better legal status for animals. Nonetheless, the first steps have indeed been taken, and now it is a matter of consequently continuing along this path.

Far from Fauvists: The Availability of Copyright Protection for Animal Art and Concomitant Issues of Ownership

Vania Gauthreaux*

I. Introduction

"Les Fauves" (French for "wild beasts") were a group of painters in the early twentieth century, led by Henri Matisse.[1] Art critics used this derogatory term to describe the group because of the artists' use of bold colors, free form, and large brush strokes.[2] These same characteristics are applicable to describe much of the work by animal artists.[3] However, this paper attempts to demonstrate that animal artists are far from mere "wild beasts."

Animal art is a topic that merits discussion. Art works by animals have received considerable media attention in recent times. Moreover, some of these works sell for considerable sums.[4] Furthermore, a great deal of animal art reflects several creative choices on the part of the animal. As a result, these works should be protected under United States copyright law. Moreover, there appears to be a presumption that the institution that owns the animal also owns any existing copyrights in the works, as well as the proceeds obtained from the sale of the animal's creations. This paper explores whether animal works are copyrightable under United States law, and, if so, who is the owner of these copyrights.

This paper covers several areas related to animal art. Section II provides an overview of animal works, including case studies of several well-known primate and elephant artists. This article focuses on chimp artists named Congo, Cheeta, and Betsy. In addition, the article spotlights three gorilla artists, Charles, Koko, and Michael, as well as Ruby and Siri, two elephant artists. Section II also provides background information on how animal art is created and the aesthetic choices made by the animal when creating the works. Furthermore, this section discusses the popularity of animal art in the marketplace and demonstrates that animal art has value. Finally, Section II points out the similarities between animal and human artists, which provide further support for the creativity of animal artists.

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[1] Cassondra Sommer, *Henri Matisse: Newspaper in Education Let's Explore*, Staten Island Advance, Mar. 26, 2008, at B09.

[2] Mary Jane Park, 'Wild Beasts' *and Singles Mingle in Artful Setting*, St. Petersburg Times (Fla.), Sept. 25, 2002, at 8; *see also* Sommer, *supra* note 1.

[3] *See*, *e.g.*, Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/kokomart_art.html (last visited Jan. 4, 2011).

[4] *See infra* text accompanying notes 55, 114, and 125-26.

Section III describes some recent developments in the law in favor of animal rights in order to show that the legal environment is becoming more receptive to the idea of providing copyright protection to animal works. This section then discusses the legal requirements for copyright protection in the United States. Lastly, Section III demonstrates that animal art satisfies these requirements for copyright and should be protected.

Finally, Section IV addresses ownership of the copyright in animal art. This section examines the various forms of copyright ownership, namely, works made for hire, joint ownership, and individual ownership. Section IV demonstrates that animal works can be considered works made for hire in many circumstances. The section then examines the other possibilities for copyright ownership.

II. Overview of Animal Works

Many different animal species create aesthetic works. For example, B.B. King, a terrier in Memphis, paints using his paws.[5] His works were featured in a charity art show, along with works by other dogs, cats and horses.[6] In addition, a Jack Russell terrier named Tillamook Cheddar scratches designs on color-coated vellum attached to watercolor paper.[7] She has appeared on CNN and in numerous publications.[8] Furthermore, Tillamook Cheddar has had twenty solo exhibitions in the United States and Europe.[9] Moreover, Carlos, a penguin at the Akron Zoo, creates works by running across a paper-covered floor after his feet are dipped in paint.[10]

However, all animal works are not created equal. Works by animals such as Tillamook Cheddar and Carlos, while popular, lack originality. This means that these works are not deserving of copyright protection. On the other hand, a substantial amount of media attention has been devoted to works created by great apes, namely chimpanzees and gorillas, and elephants.[11] As discussed below, with some exceptions, the majority of these animal artists exercise greater control over their works than animal artists such as Tillamook Cheddar and Carlos. These animals make creative choices, such as style of brushstroke and choosing how to juxtapose their choices of paint colors. As a result, the argument for copyright protection for animal works is strongest for works by these animals.

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[5] Alan Spearman, *Picasso Paws – Rescued Animals Create Works of Art*, The Com. Appeal (Memphis, Tenn.), June 27, 2005, at B1.

[6] *Id*.

[7] TillamookCheddar.com, Tillamook Cheddar – Bio, http://www.tillamookcheddar.com/bio/index.html (last visited Jan. 4, 2011).

[8] *Id*.

[9] *Id*.

[10] Kim Hone-McMahan, *Penguin Painting Pays Art Created by the Animals Enriches Them and the Zoo*, Akron Beacon J., July 23, 2007, at A1.

[11] *See, e.g.*, Susan Wloszczyna, *Tarzan's Cheeta Takes a Swing at Painting*, USA Today, June 4, 1997, at 1D; Donna Jean MacKinnon, *Critics Go Ape Over Paintings by Gorilla*, Toronto Star, May 26, 1995, at A3; Fred Kaplan, *Art World's Newest Heavyweights Fetch Top Dollar at N.Y. Auction*, Boston Globe, Mar. 22, 2000, at A8.

A. Works by Great Apes

The great apes are humans' closest biological relatives.[12] Koko, a gorilla that understands American Sign Language, has an IQ between eighty-five and ninety-five.[13] The average IQ for humans is 100.[14] A researcher in the United Kingdom claims that chimps have their own personalities, which can be put into categories that are similar to the categories used for human personalities.[15] As a result of these similarities, it comes as no surprise that great apes possess the creative potential to create artworks.

Apes enjoy creating works with crayons, pencils, and paint.[16] They also use watercolors and pastels.[17] In addition, gorillas Koko and Michael also created sculpture.[18] There is a great deal of literature regarding great ape art, particularly works by chimpanzees and gorillas.[19] Each is examined in turn.

1. Chimpanzees

Similar to humans, chimp artists possess personal styles. This demonstrates that chimps are capable of making creative decisions because each chimp's work is different. Some chimps prefer to represent objects, while others prefer the wild use of color.[20] Each chimp artist differs in how he or she holds a brush and makes brushstrokes.[21] Also akin to human artists, chimps make creative decisions

[12] Donald G. McNeil, Jr., *Which Kinds of Rights Do Nonhumans Deserve?*, Int'l Herald Trib., July 15, 2008, at 6. Great apes include chimpanzees, bonobos, gorillas, and orangutans. *Id*.

[13] Jay Scott, *Young Gorilla Has Learned Sign Language Koko Speaks Volumes About Man*, Globe And Mail (Can.), Feb. 23, 1980.

[14] Prof. William Reville, *The Clever System for Measuring Intelligence*, Irish Times, Aug. 21, 2003, at 8.

[15] Jennifer Trueland, *Rights Plea for Apes With Personality*, Scotsman, Apr. 9, 1999, at 30. Dr. Lindsay Murray of University College, Chester, determined that, just like humans, chimps could be placed into different personality categories depending on how excitable, sociable, timid, or placid they are. *Id*. Dr. Murray noted five distinct personality types that roughly correspond with those seen in humans: excitably confident, sociably confident, excitably timid (excitable but lacking in confidence), sociably timid (sociable but lacking in confidence), and sociably placid (found only in immature chimps). *Id*.

[16] Sarah Boxer, *It Seems Art Is Indeed Monkey Business*, N.Y. Times, Nov. 8, 1997, at A1.

[17] Vanessa de la Torre, *Primate Palettes*, St. Petersburg Times (FL), Jan. 23, 2006, at 1.

[18] Gaye Leigh Green, *Picassos of the Animal World*, 105 School Arts 36(1), no. 8 (Apr. 1, 2006).

[19] *See*, *e.g.*, *Art World's Going Ape*, Sunday Telegraph (Sydney, Austl.), Sept. 26, 2004, at 55; de la Torre, *supra* note 17.

[20] Boxer, *supra* note 16. Roger Fouts, a professor of psychology, argues that apes are creating representational art. *Id*. He states that, when asked to draw a dog, Washoe consistently creates the same basic drawing (a circular pattern in the upper left corner that comes down to the center and ends in a long loop at the end). Furthermore, Washoe gives the sign for "dog" when asked what the subject of her work is. *Id*.

[21] *Chimps at OSU Play Picasso for Research Project Their Paintings Fetch Pretty Penny at Auction*, Akron Beacon J., Jan. 31, 2004, at B4.

regarding the selection of colors.[22] Frequently, the chimps are offered a variety of different colors and are allowed to choose which ones they want to use.[23] This fact also strengthens the argument that animal artists, like their human counterparts, make creative decisions when they create their artworks.

Just as some humans are not interested in art, some chimps demand a palette, while others cannot be bothered with the task.[24] One chimp, Noel, gets so excited at times that she paints with a brush in each hand and one in her foot.[25] Several chimps have even used sidewalk chalk to enhance their living spaces.[26] This is evidence that some chimps possess an innate desire to create. One captive chimp turned artist even likes to sign her creations with a footprint.[27]

Chimps have also been known to express their creativity by taking photographs. Mr. Jiggs was a toilet-trained female chimp that enjoyed drinking liquor and Pepsi and smoking cigarettes.[28] Mr. Jiggs' owner used to hire out the chimp's services for private parties.[29] Mr. Jiggs would roller skate, mix drinks, ride bikes, and take photographs.[30] In another instance, a chimp named Mikki took photographs in Red Square that were later displayed at an exhibit in Venice, Italy.[31] Finally, human photographer Steve Bloom won a top award for a close-up photo of a lioness about to pounce.[32] While Bloom first claimed that he took the picture himself, he later stated that a chimp had stolen his camera during his safari and that the chimp must have taken the picture as the lion was about to attack it.[33] Notably, a dispute arose over the copyright in the photograph, and legal experts stated that it could be argued that the chimp owns the copyright.[34]

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[22] Chris Colin, *New Breed of Hamptons Paint Slingers*, N.Y. Times, Dec. 9, 2007, at 238. In the following dialogue, two chimpanzees, Tatu and Washoe, discuss painting in sign language with their human handler: "Give! give! give! . . . Brush! brush!" "What color do you like best, Tatu?" "Black, black!" "And you, Washoe. What color?" "Red, red!" "Why?" "Beautiful, beautiful!" "Do you prefer to paint or to eat?" "Eat, paint, eat, paint, painting good!" Boxer, *supra*, note 16. This conversation is evidence of the creative nature of animal artists. Color selection is part of the creative process of creating protectible artworks. Likewise, Asuka, a chimp in Japan whose work has been featured in Tokyo galleries, rarely uses black paint, prefers bright colors, and has been known to dwell over a work for many hours. *Art World's Going Ape*, *supra* note 19.

[23] *Chimps at OSU Play Picasso for Research Project Their Paintings Fetch Pretty Penny at Auction*, *supra* note 21.

[24] Colin, *supra* note 22.

[25] Jody A. Benjamin, *Aventura Festival Shows Off Chimp Art*, S. Fla. Sun-Sentinel, Jan. 18, 1998, at 1.

[26] de la Torre, *supra* note 17.

[27] *See* Colin, *supra* note 22. This particular chimp also likes to sign other chimps' works with her footprint. *Id*.

[28] Lisa Petrillo, *The Sad Fate of Performing Primates Past Their Prime*, San Diego Union-Tribune, Sept. 2, 1997, at B-1.

[29] *Id*.

[30] *Id*.

[31] Fred Kaplan, *Art From the Massives*, Boston Globe, Mar. 19, 2000, at A1.

[32] *Top Award Pic Taken by Chimp*, Courier Mail (Queensl., Austl.), April 2, 1997, at 17.

[33] *Id*.

[34] *Id*. Interestingly, this article stated that a court was considering the copyright case. *Id*.

A few case studies of chimpanzee artists will help to further demonstrate their creativity and artistic capacity. These cases will also illustrate the popularity of artwork by chimp artists. Because of this popularity and artistic merit, the copyright and ownership issues related to animal works are worthwhile subjects. Specifically, this article will focus on famous chimpanzees named Congo, Cheeta, and Betsy.

a. Congo

Congo, known as the "Cézanne of the ape world," created roughly 400 works in the 1950's.[35] Desmond Morris, a zoologist and anthropologist,[36] conducted a series of controlled experiments at the London Zoo to explore Congo's artistic abilities.[37] Morris stated that, as time progressed, Congo changed the way he held the brush and became more focused on his works.[38] Morris stated:

> Congo became increasingly obsessed with his regular painting sessions. If I tried to stop him before he had finished a painting, he would have a screaming fit. And if I tried to persuade him to go on painting after he considered that he had finished a picture, he would stubbornly refuse.[39]

> Congo would even refuse to continue working on a piece he considered finished if it was taken away from him and brought back later.[40] When he wanted a new sheet of paper to work on, Congo would set his brush down or hold his brush out for Morris.[41] In addition, Congo was neat and rarely let paint dribble onto the table or floor.[42] Morris also observed that Congo was able to draw a circle.[43] Furthermore, when Morris drew on one half of a piece of paper, Congo would mark up the other side for balance.[44]

These facts show that, like human artists, Congo took his art seriously and had an innate sense of creativity. Congo envisioned the completed piece, refusing to add to a work he considered finished.[45] Similarly, just as a human artist might,

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[35] Diane Haithman, *Arcadian Goes Ape for Chimp Art*, L.A. Times, June 22, 2005, at E3.
[36] Nigel Reynolds, *Art World Goes Wild for Chimpanzee's Paintings as Warhol Work Flops*, Daily Telegraph (London), June 21, 2005, at 5.
[37] *See* Boxer, *supra* note 16.
[38] *See* Tom Collins, *What Is Art?*, Albuquerque J., June 24, 2005, at S8.
[39] Reynolds, *supra* note 36.
[40] Collins, *supra* note 38.
[41] Boxer, *supra* note 16.
[42] Collins, *supra* note 38.
[43] Reynolds, *supra* note 36.
[44] *Id*.
[45] *See supra* text accompanying notes 39-40.

Congo became upset if he was interrupted,[46] arguably because he had not completed the work he had in mind. Finally, Congo's sense of balance for compositions is further evidence of Congo's creative abilities.[47]

Furthermore, Congo became quite a celebrity in the art world. The Institute of Contemporary Art in London held an exhibition of his works in 1957.[48] In addition, his paintings sold for prices close to those of human artists.[49] One of Congo's works was secretly purchased for the collection of the British royal family.[50] In addition, Joan Miró and Pablo Picasso also owned works by Congo.[51] On June 20, 2005, Bonhams in London auctioned off three of Congo's paintings.[52] After a telephone bidding war,[53] an American collector bought the paintings[54] for nearly $35,000, about eighteen times more than the valuation of the paintings.[55] The collector stated that he would have paid double.[56] A painting by Andy Warhol and a sculpture by Auguste Renoir at the same auction had very little interest and had to be withdrawn.[57] These anecdotes provide evidence that animal art has value and artistic merit.[58]

Moreover, they show that copyright protection for animal art is an important subject to deal with, especially due to the art's popularity.

b. Cheeta and Betsy

Cheeta is another chimp that is famous for his artworks. Cheeta, who is blind in one eye and has a preference for schnapps, was Tarzan's original sidekick on the big screen.[59] In 1996, the National Gallery in London displayed four of Cheeta's

[46] *See supra* text accompanying note 39.
[47] *See supra* text accompanying note 44.
[48] Boxer, *supra* note 16.
[49] *Id*.
[50] *Id*.
[51] *Id*. On the topic of Congo's art, Salvador Dalí proclaimed, "The hand of the chimpanzee is quasi-human; the hand of Jackson Pollock is totally animal!" Reynolds, *supra* note 36.
[52] *See* Calum MacDonald, *Three by a Chimp, One by Warhol . . . But Which?*, Herald (Glasgow, Scot.), June 21, 2005, at 7.
[53] Reynolds, *supra* note 36.
[54] MacDonald, *supra* note 52.
[55] *See Art Lover Goes Bananas Chimp Paintings*, Mx (Austl.), June 21, 2005, at 10.
[56] Nick Ferrari, *A Chimp Fit for Chumps*, Sun (U.K.), June 24, 2005, at 11.
[57] Reynolds, *supra* note 36. The Warhol piece did not meet its reserve price. Darian Leader, *Are We Being Chumps Over the Chimp?*, Times (U.K.), June 25, 2005, at 3. Works by Damien Hirst, Jake Chapman, and Dinos Chapman at the auction either failed to sell or sold for much less. *Art Lover Goes Bananas Chimp Paintings, supra* note 55.
[58] It should also be noted that there is no requirement of artistic merit for copyright protection. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (holding that advertising posters were capable of copyright protection).
[59] *See* Richard Woods and Jason Burke, *Chimp of the Old School Hangs in National Gallery*, Sunday Times (U.K.), Sept. 29, 1996, at 9.

paintings.[60] His paintings were displayed alongside those of Peter Blake, the artist-in-residence at the gallery.[61] Similar to the case of Congo, these facts demonstrate that animal art is a meaningful topic for discussion because it is popular and has artistic merit.

There is additional evidence besides his museum show that indicates that Cheeta's work possesses artistic value. The Sunday Times, a United Kingdom publication, showed several dealers one of Cheeta's works and told them an aspiring American artist had created the work.[62] While some dealers saw through the ruse, others made comments praising the art and noted that there was a clear influence of abstract expressionism.[63] This supports an argument that some animal works are of equal quality as works by humans. No one would dispute that most human works of abstract expressionism, or even of other schools of art, possess sufficient creativity to be protected by copyright.[64] As a result, this supports the argument that animal works are sufficiently complex and creative to merit copyright protection. As further proof of the capacity of animal artists to make creative decisions, Dan Westfall, Cheeta's owner, stated that Cheeta controls every mark on the canvas.[65]

Another chimp artist is Betsy. Betsy was a famous finger-painting chimp from the Baltimore Zoo.[66] In Betsy's heyday in the 1950's, she made more money than many professional artists at that time.[67] In 2004, the American Dime Museum held a retrospective of Betsy's works, most of which were on loan from the Baltimore Zoo.[68] The exhibit and Betsy's earning capacity show that animal art is popular and worthwhile. Interestingly, due to the fact that Betsy's earnings were well over the single-worker tax deduction, the zoo had to obtain a dispensation from the Internal Revenue Service.[69] In the end, Betsy was not required to pay taxes because she was donating all of her earnings to a nonprofit organization, namely, the zoo.[70]

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[60] *See Wloszczyna*, *supra* note 11.

[61] Woods and Burke, *supra* note 59. Blake created the cover for the Beatles' album, *Sgt. Pepper's Lonely Hearts Club Band*. *Id*.

[62] *Id*.

[63] *Id*.

[64] Common geometric shapes are not capable of copyright protection. *See* Yankee Candle Co., Inc. v. Bridgewater Candle Co., 259 F.3d 25, 35 (1st Cir. 2001). *See Also* At oral argument on a motion for summary judgment regarding the copyrightability of the Koosh Ball, the district court judge challenged the Copyright Office's view of copyright protection for works that involve basic shapes. OddzOn Prods., Inc. v. Oman, 924 F.2d 346, 348 n. 1 (D.C. Cir. 1991). This judge asked counsel for the Copyright Office, "If Picasso had painted a round object on a canvas, would you say because it depicts a familiar subject-namely, something that's round-it can't be copyrighted?" *Id*.

[65] *See* Wloszczyna, *supra* note 11.

[66] Fred Rasmussen, *Betsy the Chimp's Brush with Greatness; Zoo: She Was Called the Paintin* [Sic] *Primate, and Her 'Artwork' Sold for $40 Apiece. There Were Plenty of Buyers*, BALT. SUN, Aug. 17, 1997, at 6K.

[67] *Id*.

[68] Lisa Pollak, *Highbrow or Lowbrow, It's Just Art; An Exhibit of Paintings by Betsy the Chimp Puts the Once Celebrated Simian Back in the Spotlight and Raises Unanswerable Questions*, L.A. TIMES, Jan. 16, 2004, at E30. Note that the zoo claims ownership in the paintings. *See infra* notes 136, 156.

[69] Rasmussen, *supra* note 66.

[70] *Id*.

Clearly, the fact that the IRS taxed Betsy blurs the line between animals and humans under the law. Furthermore, an animal artist having to pay taxes could make it necessary for the institution that owns the animal to ensure that the animal's obligations are met. In addition, Betsy's museum display and her popularity support the idea that copyright for animal works is an important issue.

2. Gorillas

There have been several well-known gorilla artists. Similar to Congo and some human artists, Charles, a gorilla at the Metro Toronto Zoo, only paints when he wants to.[71] Charles' keeper, Vanessa Phelan, states that there is nothing she can do if Charles does not want to paint.[72] For his color selection, Charles prefers to use black and a combination of mauves and browns.[73] He also incorporates straw from his bedding into many of his paintings, which are evenly distributed on the page.[74] Charles is also known to move the canvas so that the paint spreads around in abstract patterns.[75]

These are aesthetic decisions that Charles makes that demonstrate his creative abilities. Similar to human artists who sign their works, Charles even created a work with his toe and foot signature.[76] This can be seen as evidence that Charles takes pride in his work and is satisfied with his creation. Moreover, Charles' work does not merely consist of throwing paint on the canvas in a haphazard fashion. Charles purposefully manipulates the materials, such as straw, to achieve his desired effects.[77] Furthermore, Charles makes the creative decision to distribute the work evenly on the page.[78] Finally, Charles decides on which color combinations to use.[79]

Next are Michael and Koko, two well-known gorillas that learned American Sign Language ("ASL").[80] Information regarding these apes provides strong evidence of their capacity for creativity. Both apes created representational art,[81] but keepers considered Michael to be especially artistic.[82] The gorillas also painted abstract representations of emotions, such as love and anger.[83] At times, the gorillas would

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[71] MacKinnon, *supra* note 11.
[72] MacKinnon, *supra* note 11. Charles' temperamental nature could probably be compared to that of many human artists.
[73] Lisa Balfour Bowen, *Art World's Going Bananas*, Toronto Sun, May 28, 1995, at 16.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See supra* text accompanying notes 74-75.
[78] *See supra* text accompanying note 74.
[79] *See supra* text accompanying note 73.
[80] Green, *supra* note 18.
[81] Boxer, *supra* note 16.
[82] Green, *supra* note 18.
[83] Celeste Katz, *Koko Expands Artistic Horizons Gorillas Demonstrate Abilities & Perception*, Daily News (N.Y.), Oct. 10, 2000, at 5.

paint from a model.[84] On other occasions, they would just use their imaginations.[85] Humans set up their canvases and gave the gorillas a palette and brushes, but the humans provided no other assistance.[86] An examination of both Michael and Koko provides strong evidence of their artistic and creative abilities.

a. Koko

Koko can comprehend more than 1000 signs based on ASL and roughly 2000 words of spoken English.[87] Similar to Michael's *Apple Chase*,[88] Koko painted *Bird*,[89] which is considered to be a depiction of Koko's former pet blue jay.[90] In this work, Koko made numerous creative decisions, including ones related to the brushstrokes and colors.[91] In addition, the Koko-titled *Pink Pink Stink Nice Drink* is an abstract representation of a picture Koko saw of a valley with a stream and pink flowers.[92] "Stink" is Koko's sign for flowers, and "drink" is her sign for water.[93] Finally, in 2000, artworks by Koko and Michael were shown in Queens, along with samples of Koko's handwriting.[94] This further demonstrates that animal art is a worthwhile topic because it has value and is popular in society.

b. Michael

Some in art circles have compared Michael to Jackson Pollock.[95] Michael learned to use approximately 600 signs based on ASL.[96] In addition, Michael took his art very seriously.[97] Moreover, just as with Koko, there is substantial proof that Michael created representational art, especially because he named his own paintings using sign language.[98] Representational art is strong evidence of an animal's capacity for creativity because the animal has to decide how to make its

[84] Susan Thurston, *Admiring the Palette of the Apes*, St. Petersburg Times (Fla.), Nov. 9, 2002, at 3B.
[85] *Id*.
[86] *Id*.
[87] Gorilla Foundation—Koko's World, http://www.koko.org/world/ (last visited Jan. 4, 2011).
[88] Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/popup_art_apple.html (last visited Jan. 4, 2011); s*ee infra* text accompanying notes 99-100; *see also infra* text accompanying notes 231-37 for a more in-depth analysis of this work.
[89] *See* Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/popup_art_bird.html (last visited Jan. 4, 2011).
[90] Katz, *supra* note 83. S*ee infra* text accompanying notes 247-51 for a more in-depth analysis of this work.
[91] *See* Gorilla Foundation—Gorilla Art, *supra* note 89.
[92] Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/popup_art_pink.html (last visited Jan. 4, 2011). *See infra* text accompanying notes 252-55 for a more in-depth analysis of this work.
[93] *See* Gorilla Foundation—Gorilla Art, *supra* note 92.
[94] Katz, *supra* note 83.
[95] *Id*.
[96] Gorilla Foundation—Koko's World—Koko's Friends—Michael, http://www.koko.org/world/michael_bio.html (last visited Jan. 4, 2011).
[97] *See* Koko.org—News, http://www.koko.org/news/041900.html (last visited Jan. 4, 2011).
[98] *See* Katz, *supra* note 83.

art reflect the object it is attempting to depict. The animal is not merely doodling without purpose.

For example, Michael named his portrait of his dog *Apple Chase* because of the game of chase that he and his pet dog, Apple, used to play together.[99] Michael selected only black and white from a full palette to depict Apple because Apple was black and white.[100] Moreover, Michael titled his self-portrait, which features his handprint, *Me, Myself, Good*.[101] Finally, further proof of the representational nature of Michael's art can be found in his painting, *Toy Dinosaur*, which depicted one of Michael's plastic toy dinosaurs.[102] Michael used the toy as a model.[103] Before completing the work, he pressed the painting onto the ground to create the appearance of scales.[104] This provides strong evidence of Michael's creativity. Michael made the creative decision to depict the scales, and he manipulated objects in his environment to achieve his desired effect.

These case studies of Koko and Michael demonstrate that gorilla artists are creative. First, the fact that Koko and Michael create representational art provides strong evidence of their capacity for creativity.[105] The animals are capable of purposely making choices in order to create a representation of something tangible, or, in the case of emotions, intangible. Furthermore, the gorillas' use of titles provides further evidence of their creative abilities because it shows that the animals are creating meaningful works to achieve an end. Finally, just as a human artist might paint a portrait of a loved one or depict a scene from his or her childhood, the gorillas choose to depict subjects that have meaning for them, such as pets or toys.

On the other hand, some gorilla works would not qualify for copyright protection because they seem to lack creativity. For example, Okie is a gorilla at the Franklin Park Zoo whose finger paintings sell for thousands of dollars.[106] Brandi Moores, Okie's keeper, pours the paint onto a page before giving it to Okie.[107] Moores gives Okie food each time Okie touches or smears the paint on the page.[108] Unlike Charles and Michael, it appears that Okie is not making creative choices and is not very interested in her creations. As a result, Okie's works would not be good candidates for copyright protection.

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[99] *Id*.; *see* Gorilla Foundation—Gorilla Art, supra note 88; s*ee also infra* text accompanying notes 231-37 for a more in-depth analysis of this work.

[100] Katz, *supra* note 83.

[101] Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/popup_art_me.html (last visited Jan. 4, 2011).

[102] Gorilla Foundation—Gorilla Art, http://www.koko.org/friends/popup_art_dino.html (last visited Jan. 4, 2011).

[103] Katz, *supra* note 83.

[104] Gorilla Foundation—Gorilla Art, *supra* note 102.

[105] Further evidence of the creative capacity of gorillas is provided by Koko's adaptable use of ASL. Koko uses signs that she does know in order to invent compound signs to represent words she does not know. For example, Koko signs "finger-bracelet" for "ring." Gorilla Foundation—Mission Part 1: Research, http://www.koko.org/friends/research.koko.html# (last visited Jan. 4, 2011).

[106] Ric Kahn, *An Opposable Thumbs-Up At the Franklin Park Zoo, Animals Can be Artists, Too*, Boston Globe, July 1, 2007, at 10.

[107] *Id*.

[108] *Id*.

B. Works by Elephants

Great apes are not the only animals whose works are deserving of copyright protection. There are also many creative elephant artists that create protectible works. Experts do not understand why some elephants have artistic inclinations.[109] Sometimes, when alone in the wild, elephants scratch marks in the dirt with their trunks or branches.[110] Sometimes the elephants smooth out the dirt and start over, and sometimes they move to another location.[111] As a general rule, African elephants, unlike their Indian counterparts, show little interest in creating artworks, or they create works using only one color that lack organization.[112]

Elephant art is popular across the globe. It has been displayed in shows in the United States, Europe, and Asia.[113] In 2006, a large mural painted by six elephants sold for $35,000, a record amount.[114] In 2001, an elephant art exhibit in Australia brought in more than 42,000 viewers.[115] In 2000, Sotheby's in Tel Aviv auctioned thirty elephant works.[116] Finally, in 2000, Stuart Pivar, one of New York's most prominent collectors of Grand Masters art, emerged victorious in a bidding war at Christie's over a painting by an Indian elephant named Ganesh.[117] Pivar paid $2100 for the work, calling it a "world-class masterpiece."[118] This is evidence of the artistic merit and popularity of elephant art, which makes it a worthy topic to address.

Similar to ape and human art, some elephant artists express subject matter preferences. Hong, a Thai elephant, shows a preference for painting an elephant holding flowers and the Thai flag.[119] Moreover, some elephant pieces have fooled the art world. Elizabeth Ball, a gallery owner in Connecticut, showed canvases done by two African elephants to a New York City gallery without identifying the

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[109] Steve Wiegand, *Art? It May be in the Eye of the Behemoth*, Sacramento Bee, Oct. 16, 1993, at A1.

[110] *Id*.

[111] *Id*.

[112] *See* Vicki Croke, *Zoos Cash in on Pachyderm Picassos*, Boston Globe, Aug. 20, 1994, at 25. One exception is Starlet, an African elephant painter in Atlanta. *Id*. Asian elephants are considered more adaptive than African elephants. Kevin McCarthy, *Gray Matter Art Exhibit Features Painting by Elephants*, Advoc. (Stamford, Conn.), Sept. 7, 2008, at 1.

[113] Marylou Tousignant, *These Animals Paint for Fun and Money*, Merrillville-Post Trib., May 31, 2007, at D2. Sydney's Museum of Contemporary Art recently held an exhibition of elephant art entitled, "When Elephants Paint." *Pachyderm Painting*, Evening Post (N.Z.), June 19, 2001, at 9.

[114] Tousignant, *supra* note 113.

[115] *Id*.

[116] *Artistic Elephants Display Some Heavyweight Talent*, Scotsman (Edinburgh, Scot.), June 5, 2000, page unavailable.

[117] Kaplan, *supra* note 11.

[118] *Id*.

[119] Maeve Quigley, *We Love Telly: We Love Documentary – Extraordinary Animals Five*, Mirror (U.K.), Jan. 2, 2008, at 1.

artists.[120] Everyone there loved the works and commented on the brushwork.[121] When Ball revealed that the artists were African elephants, the art crowd assumed Ball meant that humans had painted the works as a benefit for elephants.[122] Finally, Ball clarified that the elephants were actually the artists themselves.[123] The fact that the gallery was tricked demonstrates that elephant art has merit and importance in the art world. Two elephants that have received recognition are Ruby and Siri.

1. Ruby

Ruby was an Asian elephant that resided at the Phoenix Zoo.[124] Her paintings sold for $3000 each,[125] and her artwork brought the zoo roughly $100,000 per year.[126] Ruby's keeper would set up eight or nine glass jars each containing a different colored paint.[127] Ruby indicated her choice by pointing to the color she wanted to use.[128] This was a creative choice by Ruby because she decided how to aesthetically arrange the colors in the composition. Ruby preferred to use red, yellow, and blue, although researchers are still debating whether elephants are colorblind.[129] In addition, she also selected from a variety of brushes.[130] Ruby chose when to freshen the brush and when she had completed a work.[131] If the keeper attempted to give her a color she had not chosen, Ruby refused to use it.[132] To signal that a work was finished, Ruby either backed away from the work or refused to select another color.[133] Similar to Congo, Ruby's decisiveness regarding color selection and the completion of a work seem to reflect her innate creative abilities and artistic vision for a piece.

Furthermore, Ruby may have produced representational art. Similar to that of Koko and Michael, this representational art reflects Ruby's capacity for creativity. For example, the use of red and blue in her work, *Fire Truck*, may have been inspired by emergency vehicles and personnel that had been at the zoo earlier

[120] McCarthy, *supra* note 112.
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] Croke, *supra* note 112.
[125] Duncan Mansfield, *Art Adds a Little Color to Timid Elephant's Life at Zoo*, Phila. Inquirer, Sept. 7, 1997, at A24. Ruby's paintings have gone for as much as $3,500. *Wiegand, supra* note 109. At one time, there was a waiting list of more than three years for a Ruby painting. *Id*. A gallery in Scottsdale sold all of Ruby's thirty-nine works in two days. *Id*.
[126] Kaplan, *supra* note 31.
[127] Wiegand, *supra* note 109.
[128] *Id*. Similarly, Renee, an elephant in Toledo, Ohio, motions toward her trainer when she wants a new brush with a different color. Kaplan, *supra* note 31.
[129] Croke, *supra* note 112.
[130] Wiegand, *supra* note 109.
[131] Croke, *supra* note 112.
[132] *Id*.
[133] *Id*.

that day.[134] Interestingly, the zoo claims a copyright interest in both the originals and prints made of Ruby's work, but the zoo is aware that the claim in the originals may not stand.[135] Unfortunately, the zoo's reasoning for why it believes it may not have a valid claim in the originals is unclear.[136]

2. Siri

Siri is an Asian elephant that resides at the Syracuse Zoo.[137] In 1984, David Gucwa, Siri's handler at the time, and James Ehmann, a reporter, sent some of Siri's drawings to artist Willem de Kooning with a note explaining the identity of the artist.[138] de Kooning and his wife examined the art before reading the letter, and they were quite impressed.[139] Upon reading the letter, de Kooning stated, "That's a damned talented elephant."[140] Likewise, after receiving samples of Siri's art from Gucwa and Ehmann, a spokesman for The Museum of Modern Art stated that it was speechless and would not take any more phone calls.[141] These facts show that Siri's art possesses artistic merit. While this is not required for copyright protection,[142] it can be seen as proof of innate creativity. Moreover, these facts demonstrate that elephant works have value and that copyright protection for animal art is an important issue.

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[134] *Id*.

[135] Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archaeology*, 10 Harv. J.L. & Tech. 281, 300 n.110 (1997).

[136] Note that, by claiming copyright in the originals, the zoo is asserting a belief that Ruby's original works are capable of copyright protection. However, the article does not state the reason why the zoo doubts its claim in the originals. Does the zoo believe that Ruby owns the rights to the originals herself, or does the zoo believe that the original may not protectible at all? One explanation may be based upon the fact that the zoo does not express any doubt about its claims to the copyright in the prints of Ruby's works. The zoo may claim the rights to the prints as derivative works. A derivative work is defined as a "work based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (West 2005). A simple example of a work that could qualify as a derivative work would be a French translation of an English novel, with the English version being the underlying work. However, if the zoo claims the rights to the prints as derivative works of Ruby's paintings, the underlying works, that is, Ruby's original paintings, must be copyrightable. *See* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1078 (9th Cir. 2000) (noting that a derivative work must be based on a preexisting work that is copyrightable). Therefore, based on the fact that the zoo believes its copyright interest in the prints is valid, the zoo must also believe that Ruby's original works are protected by copyright. As a result, the only plausible explanation for why the zoo doubts its claim in the originals is that the zoo believes that Ruby may own the copyrights.

[137] Elephants Encyclopedia—Siri, an Asian elephant (Elephas maximus) at Syracuse Zoo (Rosamond Gifford Zoo), http://www.elephant.se/database2.php?elephant_id=770 (last visited Jan. 4, 2011); *Elephant's Art Touches a Hidden Part of Us All*, Orlando Sentinel, Mar. 5, 1986, at E2.

[138] A Damned Talented Elephant, http://ecclesiastes911.net/story/damned_talented_elephant.html (last visited Jan. 4, 2011).

[139] *Id*.

[140] *Id*.

[141] *Elephant's Art Touches a Hidden Part of Us All*, *supra* note 137.

[142] *See supra* note 58.

Siri seemed to possess a drive to create. Gucwa had noticed that Siri would scratch designs using pebbles on the floor of her pen at night for her own enjoyment.[143] Siri only drew when she wanted to, and Gucwa never gave her any rewards for her performance.[144] Interestingly, after seeing the public response to Siri's art and realizing the value of her work, the county in New York that operated Siri's zoo and owned the elephant prepared to sue Gucwa for ownership of Siri's artworks.[145]

3. Asian Conservation Efforts

Further support for the propositions that animal art is an important topic and is capable of copyright protection can be found in Asia. Russian artists Vitaly Komar and Alex Melamid established the Asian Elephant Art and Conservation Project, which set up art schools for elephants that use Thai mahouts (trainers) to teach the elephants how to paint.[146] Christie's regularly auctions the elephants' art, which provides thousands to support the schools.[147] Profits from art sales in the United States go to support elephant projects in Thailand through the World Wildlife Fund.[148]

Similar to human artists, Komar and Melamid claim that each elephant has its own style and artistic personality.[149] This is further evidence that elephants possess creative abilities because it is these distinct creative decisions that make an artist's style recognizable. Furthermore, Melamid states that the elephants can tell the difference between colors.[150] In addition, different elephants and different trainers use different methods to hold the brush.[151] While most of the works are considered abstract expressionist, the elephants are now being taught to create realistic works.[152]

The extent of the creative choices made by the Thai elephants is not clear. In 1998, the Secretary General of the Wild Animal Rescue Foundation of Thailand stated that the paintings are a collaborative effort between the elephant and the mahout, with the mahout generally deciding on the colors and when the work is completed.[153] Clearly, if a work has substantial human involvement, the work can

[143] *Elephant's Art Touches a Hidden Part of Us All*, *supra* note 137.
[144] *Id*.
[145] *Id*.
[146] Peggy McMullen, *When Elephants Paint*, Oregonian, Dec. 31, 2000, at E10. After Thailand banned logging, its elephants had no work and began to die off. Chip Johnson, *Trunkful of Art at Cal. Exhibition*, S.F. Chronicle, Mar. 29, 2002, at 1. In essence, the art schools are helping to preserve the elephants. Kaplan, *supra* note 31.
[147] McMullen, *supra* note 146.
[148] James McLean, *Elephants: The Next Jackson Pollock? Their Works May Be Sold as Part of a Program to Save Thailand's National Animal*, Orlando Sentinel, Dec. 6, 1998, at F3.
[149] McMullen, *supra* note 146.
[150] McLean, *supra* note 148.
[151] Johnson, *supra* note 146.
[152] Green, *supra* note 18.
[153] McLean, *supra* note 148.

hardly be classified as elephant art. However, a 2002 article quotes Melamid as saying that some elephants learn to dip the brush on their own and choose their own colors.[154] This strengthens the argument that the animal itself is making the creative choices that are deserving of copyright protection, such as juxtaposition of colors.[155] Moreover, it seems that it is the elephant that makes the creative decisions regarding brushwork and arrangement on the canvas. Finally, on an interesting note, a 1998 article states that Melamid was in talks with Disney and Starbucks for the use of images of the art.[156]

4. Elephant Works that Lack Originality

The creativity of elephants like Ruby and Siri becomes even clearer when their artistic methods are compared to those of another elephant whose works seem to lack creativity. In Oregon, an Asian elephant named Rama uses an unusual technique to paint.[157] Rama's trainer, Jeb Barsh, injects nontoxic paint into Rama's trunk using a needle-less syringe.[158] The elephant then proceeds to blow the paint out onto the canvas.[159] Besides blowing, Rama sometimes uses a brush on the canvas and sometimes applies the paint directly onto the canvas using his trunk like a brush.[160] Barsh gives Rama treats after every blow or mark.[161] In addition, Barsh decides the colors and the technique that will be used.[162] A regarded gallery in Portland displayed Rama's paintings in 2004.[163]

The type of work that Rama does seems to lack creative thought. Rama is not making any decisions regarding what how to depict the subject of the work or

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[154] Johnson, *supra* note 146.

[155] Further proof of the creative nature of elephants can be found in the world of music. Elephant painters at Thailand's Elephant Conservation Centre of the Forest of Industrial Organization released a jazz compact disc containing elephant music made with specially designed mouth organs. *Big Impact in the Art World*, News Letter (Belfast, Northern Ireland), Dec. 20, 2000, page unavailable. In addition, Ruby may even be a musician. Once Ruby's keepers noticed that she used stones to tap on bars, they built a giant xylophone for her. She greatly enjoyed it at first, but then her interest waned. *Id*.

[156] McLean, *supra* note 148. If the works are not protected by copyright, Disney and Starbucks would not need any permission to reproduce them. Because the article refers to the use of images, Melamid may be claiming the rights to prints of the underlying artworks. *See Id*. This raises the same issue regarding derivative works that was discussed in relation to Ruby's works. *See supra* note 136. If the underlying works by the elephants are not protected by copyright, Melamid cannot have a copyright in any derivative work (print) based on the paintings. *See* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1078 (9th Cir. 2000) (noting that a derivative work must be based on a copyrightable preexisting work).

[157] *See* D.K. Row, *Abstract Eruptionism*, Oregonian, May 22, 2004, at E01.

[158] *Id*.

[159] *Id*.

[160] *Id*. Barsh applies the paint to Rama's trunk. *Id*.

[161] *Id*.

[162] *Id*.

[163] *Id*.

what the final painting will look like if he is merely blowing paint onto the canvas. Moreover, Barsh decides the colors and what technique will be used to create it. As a result, Rama's works do not display the same amount of creativity on the part of the animal as works by Ruby and Siri do. Therefore, the argument for copyright protection in Rama's art is considerably weaker than it is for works by animals such as Ruby and Siri.

III. Copyright in Works by Animals

The situations detailed above illustrate that some animals possess the artistic and creative abilities to create art works. Moreover, the market for and popularity of these works demonstrate that animal art is an issue worth addressing. Furthermore, there is support that the monetary value of the works is due to the artistic merit of the works, rather than the works being mere novelties.[164] In addition, the Association of Zoos and Aquariums does not keep statistics on animal art, but the spokesman for the organization stated that it is noticing an increase in the amount of animal artwork.[165] The money from the sale of most animal art goes to support conservation efforts.[166]

It appears that zoos assume that they own the artworks created by the animals that they own.[167] In addition, while it is unclear whether zoos believe that they have a legitimate claim ofownership of the copyright in the original work, it seems that they claim copyright in prints of the work.[168] This claim necessarily assumes that the underlying work is protected by copyright.[169] As a result of this uncertainty on the part of zoos, as well as the popularity of animal art, the copyright law should be examined to determine whether animal art is capable of being protected by copyright. The analysis of the copyright law that follows demonstrates that animal art meets the statutory requirements for copyright protection and should be protected.

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[164] First, several individuals in the art world have mistakenly thought that animal works were actually works done by humans. *See supra* text accompanying notes 120-23 and 138-40. In addition, several museums throughout the world have held showings of animal art. *See, e.g., supra* text accompanying notes 48, 60, and 67. Finally, Howard Hong, the American collector who purchased three of Congo's paintings at the Bonhams auction, stated that he had a "visceral reaction" to Congo's art upon seeing it featured in a magazine. *Haithman*, *supra* note 35. Hong said Congo's art reminded him of prints by Japanese artists Hokusai and Hiroshige. *Id.* This demonstrates that some collectors buy animal art for its artistic value, rather than as a mere conversation piece.

[165] Teresa Annas, *Animals Earn Their Keep In Hampton Roads and Abroad with Art*, Virginian-Pilot, Aug. 11, 2007, page unavailable.

[166] *See id.*

[167] There is a distinction between ownership of the physical object and ownership of the copyright. 17 U.S.C. § 202 (West 2005).

[168] *See supra* notes 136 and 156. In 2006, Chimp Haven, a retirement facility for chimps used in research, held a showing of its chimps' art at a café and also offered prints and note cards for sale. *Local News* (KTBS-LA ABC Shreveport television broadcast Mar. 23, 2006).

[169] *See supra* notes 136 and 156.

A. The Legal Landscape of Animal Rights

There have been recent legal developments that provide special rights to primates, especially chimps, as well as to animals in general. The Great Ape Project ("GAP") is an organization that works internationally to obtain legal rights for great apes.[170] In June 2008, the Spanish Parliament announced its support for GAP's mission.[171] The Spanish legislation will provide rights to apes by outlawing experimentation and prohibiting their use in film and television.[172] The proposals provide that the apes would be placed under the moral guardianship of the state, a status similar to that of children and those in comas, rather than considered as property.[173] The Spanish law recognizes that great apes are similar to human children in the experience of emotion and cognitive capacity and awareness.[174]

In 2002, Harvard Law School hosted a legal symposium regarding the possibility of obtaining legal rights for great apes.[175] In addition, several statutes and regulations have been enacted in the United States to protect great apes. For example, Congress amended the Animal Welfare Act in 1985 to provide for the mental well being of primates.[176] Moreover, United States Department of Agriculture regulations provide for the psychological health of nonhuman primates by requiring that holders of the animals develop an environment enhancement plan.[177]

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[170] Rachel Nowak, *Almost Human*, New Scientist, Feb. 13, 1999, at 2020.

[171] *The PETA Files: Historic News! Spain to Extend Rights to Great Apes*, http://blog.peta.org/archives/2008/06/historic_news_s.php (last visited Jan. 4, 2011).

[172] *Id*. The United Kingdom has also restricted ape experimentation. Wai Lang Chu: *Spain Muses Over Possibility of 'Human' Rights for Apes*, http://www.drugresearcher.com/Research-management/Spain-muses-over-possibility-of-human-rights-for-apes, June 16, 2006 (last visited Jan. 4, 2011). Moreover, New Zealand passed a law in 1999 providing that research, teaching, or testing involving a great ape required government approval. *Id*. In addition, biomedical research on chimps is banned in the Netherlands. *Id*. Furthermore, many major companies, including Subaru, Honda, PUMA, and Yahoo!, have pledged never to use great apes in advertising due to the abuses that these animals receive in the industry. *Ad Council (Hearts) Great Apes*, http://blog.peta.org/archives/2008/11/ad_council_hear.php (last visited Jan. 4, 2011). In addition, actress Anjelica Huston is working with People for the Ethical Treatment of Animals ("PETA") to urge the entertainment industry to stop using great apes in its projects. *Anjelica Huston Tells Hollywood: No More Monkey Business*, https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=2001 (last visited Jan. 4, 2011). In a video Huston made for PETA, she explains that great apes are taken from their protective mothers as newborns in order to participate in entertainment works. *Id*. She further states that the babies are often physically abused in training sessions. *Id*. Once the apes become older and too strong to handle, they are abandoned and forced to live in substandard conditions in roadside zoos or pseudo-sanctuaries for the rest of their lives, which can be fifty years or more. *Id*.

[173] Chu, *supra* note 172.

[174] *See* Paul Belien, *Gorillas Chasing Bubbles: Spain Enters New Age of Enlightenment*, Brussels Journal, June 22, 2006, http://www.brusselsjournal.com/node/1123 (last visited Jan. 4, 2011).

[175] *The Evolving Legal Status of Chimpanzees: The Remarks*, 9 Animal L. 1, 1 (2003).

[176] *Id*. at 34. The statute provides that dealers, research facilities, and exhibitors must provide "a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C.S. § 2143(a)(2)(B) (LexisNexis 2007).

[177] 9 C.F.R. § 3.81 (2005). The plan must provide for social grouping to address the social needs of nonhuman primates that exist in social groups in nature. *Id*. § 3.81(a). In addition, the enclosures

Furthermore, in 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act,[178] which provides funds for a retirement facility for chimps that have been used in federally sponsored medical research.[179] This Act recognizes that society has obligations toward research chimps and that the chimps are morally relevant beings.[180]

Finally, with regard to all types of animals, the Uniform Trust Code now allows for an animal to be the beneficiary of a trust.[181] The court can substitute trustees, and third parties can be appointed to ensure that the trustee performs his or her obligations.[182] Notably, the first signing chimp, Washoe,[183] was the beginning of the modern history of legal rights for animals.[184]

When concern arose regarding the use of Washoe in medical testing, lawyers in New York set up a trust for Washoe funded with the proceeds of a book that had been written about the chimp and appointed a guardian to protect him.[185] However, New York law provided that a guardian could be appointed for a "person with a disability."[186] The attorneys had to convince the court that Washoe and other chimps like him should be treated as persons under New York law.[187] The lawyers argued that, because of the mental and emotional characteristics of chimps, they should be treated as the legal equivalent of minors or disabled persons.[188] In 1997, a New York court agreed, and the court appointed a guardian to administer the trust for the chimps.[189]

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must provide opportunities for species-typical activities, such as mirrors, swings, and objects to manipulate. *Id*. § 3.81(b). The regulation also mandates that environmental enhancement for certain nonhuman primates, such as juveniles or those in psychological distress, must be provided special attention. *Id*. § 3.81(c). Finally, restraint devices are prohibited except in certain limited circumstances. *Id*. § 3.81(d).

[178] *The Evolving Legal Status of Chimpanzees*, *supra* note 175, at 35.

[179] 42 U.S.C. § 287a-3a(a) (West 2003). The Act also includes restrictions on research that can be performed on sanctuary chimps. *See Id*. § 287a-3a(d)(3).

[180] *The Evolving Legal Status of Chimpanzees*, *supra* note 175, at 35.

[181] Unif. Trust Code § 408 (2000); *accord The Evolving Legal Status of Chimpanzees*, *supra* note 175, at 35. These trusts are enforceable, unlike honorary trusts. *The Evolving Legal Status of Chimpanzees*, *supra* note 175, at 35. One high-profile example of an animal trust is the one set up by billionaire Leona Helmsley for her dog, Trouble. Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, New Yorker, Sept. 29, 2008, at 38. Helmsley set up a trust in her will, leaving $12 million to Trouble. *Id*. However, on April 30, 2008, a judge reduced the trust fund to $2 million. *Less Goin' to the Dog*, Newsday (N.Y.), June 17, 2008, at A17. The difference will go to Helmsley's charitable trust. Toobin, *supra*. Helmsley intended care of dogs to be the primary purpose of this charitable trust. *Id*.

[182] *The Evolving Legal Status of Chimpanzees*, *supra* note 175, at 35.

[183] *See supra* note 22 for an example of Washoe using sign language to discuss art.

[184] Toobin, *supra* note 181.

[185] *Id*. The lawyers also appointed a guardian to protect other chimps similar to Washoe. *Id*.

[186] *Id*.

[187] *Id*.

[188] *Id*. The attorneys bolstered their arguments by including affidavits from animal experts such as Jane Goodall. *Id*.

[189] *Id*. Jane Hoffman, the attorney that brought Washoe's case to her firm, remarked that, "[T]he law is . . . catching up with the idea that people don't consider their pets property . . . ." *Id*.

The trust was also respected by the State of Washington, where Washoe resided.[190]

In sum, these legal developments demonstrate an awareness of the fact that animals, particularly primates, deserve certain legal protections. Given this landscape and the current status of the animal art world, it is not unthinkable that animals may be accorded legal protection for their intellectual property creations. The next section describes the statutory requirements for copyright and provides an analysis of whether animal art can meet these criteria.

B. Statutory Requirements for Copyright

The Copyright Clause of the United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[191] The Supreme Court interpreted "writings" broadly to include "any physical rendering of the fruits of intellectual or creative labor."[192] Likewise, the Supreme Court defined "author" as "he to whom anything owes its origin; originator; maker . . ."[193] Moreover, the Supreme Court has construed the constitutional requirements of "writing" and "author" together as an indication that originality is required for copyright protection.[194]

There are two relevant acts that Congress has passed regarding copyright.[195] Each will be examined, along with the potential for copyright protection for animal art under each act Specifically, the Copyright Act of 1976 ("1976 Act") applies to works created on or after January 1, 1978.[196] On the other hand, the Copyright Act of 1909 ("1909 Act") applies to works created prior to January 1, 1978.[197]

Under the 1909 Act, statutory copyright protection began on the date that the work was published with proper copyright notice[198] or when the work was registered prior to publication.[199] "[P]ublication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public... "[200] If a work was

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[190] *Id*.
[191] U.S. Const. art. I, § 8, cl. 8.
[192] Goldstein v. Cal., 412 U.S. 546, 561 (1973).
[193] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884).
[194] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (citing In re Trade-Mark Cases, 100 U.S. 82, 94 (1879)).
[195] *See* Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, 380 F.3d 624, 628 (2d Cir. 2004).
[196] 17 U.S.C. § 302(a) (West 2005).
[197] *Martha Graham*, 380 F.3d at 632.
[198] Scherr v. Universal Match Corp., 297 F. Supp. 107, 111 (S.D.N.Y. 1967).
[199] Roy Exp. Co. Establishment of Vaduz, Liech. v. Columbia Broad. Sys., 672 F.2d 1095, 1101 n.13 (2d Cir. 1982).
[200] Dolman v. Agee, 157 F.3d 708, 713 (9th Cir. 1998) (quoting Am. Vitagraph, Inc. v. Levy, 659 F.2d 1023, 1027 (9th Cir. 1981)).

published without proper notice, it went into the public domain.[201] To the extent that a work was not registered or published, it remained protected by state common law copyright until the 1976 Act went into effect on January 1, 1978.[202] When a work was registered under the 1909 Act, common law protection for that work ceased.[203] Once the 1976 Act took effect, unpublished, unregistered works received the same length of copyright protection as works created on or after January 1, 1978.[204]

Several of the works described in this paper were created before 1978 and would fall under the 1909 Act. It is not likely, however, that any of these works were ever registered under the 1909 Act. Publication is a more likely scenario, especially if prints of the work were sold to the public. For publication to occur, there must be authorization by the copyright owner.[205] If the zoo or institution owns the copyright, this authorization may be present.[206] If the copyright owner authorized the publication and the work did not contain a proper copyright notice, the work went into the public domain.[207] However, if the publication was not authorized, the work retained its common law protection until January 1, 1978, because it would not meet the definition of a publication.[208]

Because the requirements for works created after 1978 cover the future of this issue, the main focus of this section will be on the requirements for works under the 1976 Act. The 1976 Act provides a general definition that sets out the requirements for copyright protection.[209] Specifically, the 1976 Act provides, "Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression... "[210] One of the categories of works of authorship is pictorial, graphic, and sculptural works.[211] In essence, there are three basic statutory requirements for

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[201] *Martha Graham*, 380 F.3d at 632-33. Notice was also required under the 1976 Act on publicly distributed copies. 17 U.S.C. § 401(a). This requirement was eliminated when the United States implemented the Berne Convention. Pub. L. No. 100-568, § 7(a), 102 Stat. 2853 (1988).

[202] *Martha Graham*, 380 F.3d at 632-33.

[203] Shoptalk, Ltd. v. Concorde-New Horizons Corp., 168 F.3d 586, 591 (2d Cir. 1999).

[204] *See Id*. Under the 1976 Act, works by individual authors are protected by copyright for a term consisting of the life of the author plus seventy years after the author's death. *See* 17 U.S.C. § 302(a). For works made for hire, copyright protection extends for a term of ninety-five years from the year of the work's first publication, or for a term of 120 years from the year of the work's creation, whichever expires first. *Id*. § 302(c).

[205] *See Dolman*, 157 F.3d at 713 (quoting Am. Vitagraph, Inc. v. Levy, 659 F.2d 1023, 1027 (9th Cir. 1981)).

[206] This authorization would be absent if the animal owns the copyright.

[207] *Martha Graham*, 380 F.3d at 632-33.

[208] *See Dolman*, 157 F.3d at 713 (quoting Am. Vitagraph, Inc. v. Levy, 659 F.2d 1023, 1027 (9th Cir. 1981)); *see also Shoptalk*, 168 F.3d at 591.

[209] *See* 17 U.S.C. § 102.

[210] *Id*. § 102(a).

[211] *Id*. § 102(a)(5). Pictorial, graphic and sculptural works include, among other types of works, two-dimensional and three-dimensional works of fine, graphic, and applied art, as well as photographs, prints, and art reproductions. *Id*. § 101. The animal works at issue here would fall under this category. The 1978 Act provides for eight categories: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual

copyright protection: fixation, expression, and originality. A brief application of the statutory requirements to animal art reveals that these requirements are satisfied.

1. Fixation

One of the requirements for copyright protection under the 1976 Act is fixation.[212] The 1976 Act states that "[a] work is 'fixed' in a tangible medium of expression when it is... sufficiently permanent or stable... " to enable the work to be perceived or reproduced.[213] The work must be fixed by or under the authority of the author.[214] The fixation requirement is easily met in the case of animal art. The artwork is fixed because the work is created on a canvas or a piece of paper. This canvas or paper is permanent and allows the work to be perceived and reproduced. Finally, the animal artist puts the work onto the canvas or paper, which satisfies the requirement that the work be fixed by or under the authority of the author.[215]

2. Expression

The next statutory requirement is expression.[216] Expression is defined as those parts of a work that reflect the originality of the author.[217] Copyright only protects expression, not mere ideas, facts, or concepts.[218] A related concept to the general rule that copyright protects the expression of ideas, not ideas themselves, is found in the merger doctrine.[219] The merger doctrine provides that, when there is only one way to express an idea, this expression will not be protected because it would essentially extend copyright protection to the idea itself.[220]

Here, the expression requirement is easily met. The animal is marking the canvas or paper in creative ways that are not mere ideas or facts. Every stroke reflects the creative thoughts of the animal artists. Therefore, these strokes constitute expression. Moreover, there is certainly more than one way to create a painting or work of art, so there are no issues with the merger doctrine. In conclusion, the requirements of fixation and expression for copyright protection are satisfied with regard to animal art.

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works; sound recordings; and architectural works. *Id*. § 102(a).

[212] *Id*. § 102(a).

[213] *Id*. § 101.

[214] *Id*.

[215] If the zoo or institution is found to be the author, this requirement is still satisfied because the animal is authorized by the institution to create the work.

[216] *See* 17 U.S.C. § 102(a).

[217] Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 547 (1985).

[218] 17 U.S.C. § 102(b).

[219] *See* Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991).

[220] *See* Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir. 1990).

3. Originality

The final statutory requirement is originality.[221] The requirements for originality are two-fold: the work must be independently created and contain a modicum of creativity.[222] These elements are required by the Constitution.[223] Specifically, a work is not independently created if it is copied from other works.[224] In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[225] the Supreme Court explained that the modicum of creativity is easily found in most instances.[226] The Court explained, "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[227] In addition, with regard to photographs, Judge Learned Hand opined, "[N] o photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike."[228] Arguably, Judge Hand's reasoning can be extended to cover other works of art that necessarily reflect their creators, such as paintings and drawings.

The originality requirement is met in most cases of animal art. The animals are not copying from another artwork, so there is independent creation. Moreover, the works possess the modicum of creativity necessary to satisfy the originality requirement, especially considering the low threshold discussed in *Feist*.[229] The Copyright Office has stated that creative elements in a painting include such things as depth, perspective, shading, and texture of brushstroke.[230]

Analyses of a few animal works provide strong evidence that animal art is sufficiently creative for copyright protection. Michael's work, *Apple Chase*,[231]

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[221] *See* 17 U.S.C. § 102(a).

[222] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 340 (1991).

[223] *Id.*

[224] Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc., 821 F.2d 800, 806 (D.C. Cir. 1987).

[225] 499 U.S. 340 (1991).

[226] *Id.* at 345.

[227] *Id.* Courts have found the requisite amount of creativity in very simplistic works. *See, e.g.*, Swirsky v. Carey, 376 F.3d 841, 852 (9th Cir. 2004) (stating that it could not be said, as a matter of law, that a musical composition consisting of only seven notes is too short to qualify for copyright protection); Cannon Group, Inc. v. Better Bags, 250 F. Supp. 2d 893, 901 (S.D. Ohio 2003) (holding that combination of realistic drawing of ears of corn with text "fresh corn" in fancy lettering on grocery bag possessed sufficient creativity for copyright protection). Indeed, the court in *Swirsky* remarked that originality means "little more than a prohibition of actual copying." 376 F.3d at 851.

[228] Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (S.D.N.Y. 1921).

[229] 499 U.S. at 345.

[230] Atari Games Corp. v. Oman, 979 F.2d 242, 243 n.1 (D.C. Cir. 1992) (citing Apr. 30, 1990, Letter Ruling from Copyright Office denying copyright registration to plaintiff's video game). The court noted that works involving simple shapes and few colors, such as those by Mondrian or Malevich, could also merit copyright protection because of the creativity in the arrangement. *Id.*

[231] Gorilla Foundation—Gorilla Art, supra note 88; *see supra* text accompanying notes 88 and 99-100. *See infra* p. 87 for a copy of this work.

is a portrait of Michael's pet dog, Apple.[232] Michael chose to portray a close-up of the dog's head, rather than the dog's full body.[233] In addition, Michael chose to depict the left side of the dog's face in profile view.[234] Moreover, some of Michael's brushstrokes go up and down, while some go left to right.[235] Also, in some places, Michael applied the paint very thinly, while in other places there is a thick impasto.[236] Finally, the dog is centered on the canvas, and Michael applied some shading around the sides of the canvas.[237] All of these creative choices are protectible elements that more than satisfy the requirement of a mere modicum of creativity.

Furthermore, an analysis of an abstract work by Cheeta provides the same strong evidence of creativity.[238] In this work, Cheeta's brushstrokes go in several different directions.[239] In addition, some of the strokes are long, while others are very short.[240] Moreover, Cheeta's work is centered on the canvas, while he left some of the perimeter of the canvas blank.[241] Likewise, there are white spaces in the center of the canvas.[242] Cheeta's brushstrokesalmost seem to flow out of a central point.[243] Also, the thickness of the paint varies across the composition.[244] Finally, Cheeta arranged the different colors in a creative way.[245] For example, yellow appears scattered throughout the work, while purple only appears at the bottom right.[246] In short, Cheeta made numerous creative choices in this work. Therefore, the modicum of creativity requirement is met.

Analyses of two works by Koko provide further evidence of creativity in animal art. In *Bird*, Koko's depiction of her pet blue jay,[247] Koko's brushstrokes go in all directions.[248] In addition, the work is primarily centered on the canvas with a few faint strokes at the edges.[249] Interestingly, Koko chose to use yellow

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[232] Gorilla Foundation—Gorilla Art, *supra* note 88.
[233] *See Id*.
[234] *See Id*.
[235] *See Id*.
[236] *See Id*.
[237] *See Id*.
[238] *See* Flickr—http://farm1.static.flickr.com/13/18447616_d93bf8e6f5.jpg (last visited Jan. 4, 2011). *See infra* p. 59 for a copy of this work.
[239] *See Id*.
[240] *See Id*.
[241] *See Id*.
[242] *See Id*.
[243] *See Id*.
[244] *See Id*.
[245] *See Id*. While a single color cannot be protected by copyright, a creative selection and arrangement of colors is protectible. *See* Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc., 821 F.2d 800, 806 (D.C. Cir. 1987); *see also supra* note 230.
[246] *See* Flickr, *supra* note 238.
[247] *See supra* text accompanying notes 89-90; *see also* Gorilla Foundation—Gorilla Art, *supra* note 89. *See infra* p. 89 for a copy of this work.
[248] *See* Gorilla Foundation—Gorilla Art, *supra* note 89.
[249] *Id*.

and red as the predominant colors in her depiction of the blue jay.[250] There is very little blue in the work.[251] Furthermore, in *Pink Pink Stink Nice Drink*,[252] Koko chose to juxtapose various different colors in a creative way with nearly all of the brushstrokes at an angle.[253] There are also large variations in the thickness of the paint.[254] The composition is also centered on the canvas.[255]

In addition, animal artists such as Ruby and Michael chose the subjects of their art, how to depict these subjects, which colors to use, how to arrange the colors, and when the work was completed.[256] Michael and Koko even title their works.[257] Congo refused to work on a piece after he considered it completed, even if brought to him at a later time.[258] Finally, many animal artists have preferred colors[259] and are believed to interpret real-world events and objects through their art.[260] These examples demonstrate that animal artists possess the capacity to make creative decisions. When taken in conjunction with the other creative decisions that go into each work of animal art, such as shading and brushstrokes, it is clear that most animal art possesses more than the mere modicum of creativity necessary for copyright protection.

As a result, the vast majority of animal works will meet the originality requirement. However, some animal works will not meet even this low threshold. If the animal is simply walking across papers, like the penguin described,[261] or merely blowing paint on the canvas,[262] there is little or no creativity. Furthermore, the fact that an animal is given a treat after every brushstroke may weigh against a finding of creativity. However, there may still be a modicum of creativity if the animal is choosing the subject matter of the work and the manner in which it is depicted. The next section examines whether a particular case that dealt with a work by nonhumans is applicable to animal art.

a. Urantia Foundation v. Maaherra[263]

i. Synopsis

In this case, both parties believed that the work at issue, *The Urantia Book*,

[250] *Id.*
[251] *Id.*
[252] *See* Gorilla Foundation—Gorilla Art, *supra* note 92. *See infra* p. 90 for a copy of this work.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *See supra* text accompanying notes 86, 100, 102-04, 128, and 130-33.
[257] *See supra* text accompanying notes 92, 99, and 101.
[258] *See supra* text accompanying note 40.
[259] *See supra* text accompanying notes 73 and 129; *see also supra* note 22.
[260] *See supra* text accompanying notes 84, 89-90, 92, 99, 102-04, and 134.
[261] *See supra* text accompanying note 10.
[262] *See supra* text accompanying note 159.
[263] 114 F.3d 955 (9th Cir. 1997).

was made up of messages originally composed by celestial beings and subsequently transcribed and compiled by human beings.[264] A psychiatrist, Dr. Sadler, believed that one of his patients was channeling messages from the beings.[265] In order to study the messages and ask the beings questions, Dr. Sadler and a group of humans formed the Contact Commission.[266] The Contact Commission compiled the beings' answers to these questions to form *The Urantia Papers*.[267] Later, the Contact Commission formed the Urantia Foundation to promote the teachings from *The Urantia Papers*.[268] The Contact Commission transferred the printing plates for *The Urantia Papers* to the Urantia Foundation, and the Foundation published *The Urantia Book* in 1955.[269] The Foundation received a copyright for the book in 1956, which the court found was properly renewed.[270]

The defendant, Kristen Maaherra, distributed a computerized version of the book, and she conceded copying in the case.[271] Therefore, the only issue before the court was whether the Foundation's copyright was valid.[272] Maaherra argued that the words, "work of authorship," in the Copyright Act require that there be an element of human creativity in the work.[273] Maaherra further argued that the work at issue lacked this requisite human creativity because the contents of the book came from the celestial beings.[274] As a result, Maaherra argued that the book could not be protected by copyright.[275]

ii. Holdings of the *Urantia* case

First, the court noted that the copyright laws do not expressly require human authorship.[276] Nevertheless, the court held that some element of human creativity must be present for the book to be capable of copyright protection, reasoning that copyright laws were not intended to protect works by celestial beings.[277] The court stated, "At the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity."[278] However, the court found that the human creativity requirement was met here because the human members of the Contact Commission chose

[264] *Id*. at 956.
[265] *See id*. at 957.
[266] *Id*.
[267] *Id*.
[268] *Id*.
[269] *Id*.
[270] *Id*. In a later case, a different court upheld a jury verdict that found that the Urantia Foundation's renewal copyright was invalid. *See* Michael Found. v. Urantia Found., 61 Fed. Appx. 538, 540-42 (10th Cir. 2003).
[271] *Urantia*, 114 F.3d at 956-57.
[272] *Id*. at 956.
[273] *Id*. at 958.
[274] *Id*.
[275] *Id*.
[276] *Id*.
[277] *Id*.
[278] *Id*.

the questions to ask the beings and made creative decisions in the selection and arrangement of the contents of the book.[279]

iii. Applicability of *Urantia*

The court in *Urantia* summarily decided that works require an element of humancreativity in order to be protected by copyright.[280] The court did not provide much support or reasoning for this holding, other than its opinion that copyright laws were not intended to protect works by divine beings.[281] Indeed, the court even acknowledged that the copyright laws do not expressly require human authorship and that there is a debate over the copyrightability of computer-generated works.[282]

The rule from *Urantia* that there must be an element of human creativity to be eligible for copyright protection should not be followed in the case of animal works. The facts of *Urantia* are distinguishable from the case of animal works because *Urantia* dealt with beings from another planet, while animal works are made by earthly beings.[283] Moreover, even assuming *arguendo* that the copyright

[279] See I*d*. at 959-60.

[280] *See Id*. at 958.

[281] *Id*.

[282] *Id*.

[283] There is another factor that distinguishes *Urantia* from the cases dealing with animal art. The lower court in *Urantia* held that the book should be protected as a literary work, regardless of whether the book was actually dictated by the beings. *See* Urantia Found. v. Maaherra, 895 F. Supp. 1337, 1338 (W.D. Ariz. 1995). Because of First Amendment considerations, the court decided it could not make a determination of whether the text of the book actually originated with the beings or not. *Id*. The court indicated that deciding the question either way would interfere with someone's religious beliefs. *Id*. Nevertheless, the district court stated that this determination was irrelevant because it is not necessary "that the authorship stem from human effort." *Id*. However, on appeal, the Ninth Circuit did not adopt this portion of the district court's reasoning and instead adopted the "worldly entity" requirement. *See* Urantia Found. v. Maaherra, 114 F.3d 955, 958 (9th Cir. 1997). As a result, the Ninth Circuit found that the work was protected as a compilation in order to meet its human component requirement. *Id*. at 959. However, Nimmer suggests that the district's court reasoning was more sound. 1-2 Nimmer on Copyright § 2.11[C] (2008). Nimmer's view was later adopted in a case with facts similar to those of *Urantia*. *See* Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., No. 96 Civ. 4126 (Rws), 2000 WL 1028634, at *11-12 (S.D.N.Y. July 25, 2000), *vacated*, Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., No. 96 Civ. 4126 (Rws), 2004 WL 906301 (S.D.N.Y. Apr. 27, 2004). In this copyright infringement case, Dr. Helen Schucman claimed that a voice named "Jesus" dictated messages to her in her head for her to transcribe. *Id*. at *2. In denying summary judgment for either party, the court expressed its approval of the reasoning of the *Urantia* district court and stated that dictation from a nonhuman source should not prevent copyright protection. *Id*. at *1, 11-12. Although the court stated that the work could be seen as a compilation meeting the human element requirement of the Ninth Circuit *Urantia* decision, the court noted that the more sensible result was to find that the work was a literary work written by Schucman. *Id*. at *10-11. However, after a bench trial, the court entered a judgment stating that the copyright in the work at issue was void. Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., No. 96 Civ. 4126 (Rws), 2004 WL 906301 at *1 (S.D.N.Y. Apr. 27, 2004). In sum, the cases involving nonhuman beings seem to be inconsistent. However, because animal art does not involve a belief system, it is distinguishable from the facts of these cases. Therefore, it is unclear whether the Ninth Circuit's human component requirement would be followed.

laws were not intended to protect works by divine beings, the statutes fail to specify that works which otherwise meet the statutory requirements lack protection on the basis that they were created by an animal. Specifically, the 1976 Act does not state that the creator of a work must be a human being. Given the evidence that many animal artists are similar to human artists in various ways, especially the great ape artists, as well as the broadening of legal protections for animals, animal art that meets the statutory requirements should be afforded copyright protection.

iv. Are the *Urantia* requirements satisfied?

Even if *Urantia* must be followed and there is an absolute requirement that a work contain an element of human creativity, there are two arguments that would allow for the protection of animal art under *Urantia*.

a. Human component element may be met

Urantia did not specify that the requisite human element must be copyrightable in and of itself. As a result, the human component element can easily be found in most animal art. Humans provide the animals with the equipment needed to paint, such as brushes, paper, canvases, and paints. As a result, the humans are deciding which colors to present to the animal, what the animal will create the work on, and which medium to give the animal, such as pastels, paints, or crayons. Just as choices of film and camera are considered to be creative decisions in photography,[284] the choices here are creative decisions made by the humans that would satisfy the *Urantia* requirement of an element of human creativity, whether or not these human elements are independently copyrightable.

b. "Worldly entity" language is met

The *Urantia* court stated that a work must be created by a worldly entity.[285] Clearly, an animal would qualify as a worldly entity because it is a being that lives on planet Earth.

Furthermore, the animal creates the work. Therefore, the *Urantia* requirement that the work be created by a worldly entity is satisfied in the case of animal art. In sum, there is an argument that the *Urantia* case should not be followed in the case of animal art. However, even if one adheres to the holdings from the case, there are arguments that its requirements are also met.

In conclusion, animal art should be protected by copyright. The statutory requirements are satisfied in most cases. Moreover, the fact that the artist is a

[284] *See* Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 143 (S.D.N.Y. 1968). Whether the choices of film and/or camera alone would be sufficient for copyright protection on their own is irrelevant. What is important is that these are considered to be creative choices that are examined, along with other factors, when determining whether a photograph is protected by copyright. *Id*.

[285] *See Urantia*, 114 F.3d at 958; *see also supra* text accompanying note 278.

nonhuman should not be a barrier, either because *Urantia* should not be followed in the case of animal art or because the requirements of the case are actually met. Assuming that animal art is capable of protection, the issue of ownership of this copyright must be addressed. There are several possibilities. The zoo or institution may own the copyright as a work made for hire, the animal and the zoo may be joint owners, or the animal may be a sole owner. The next section analyzes these options.

IV. Ownership of the Copyrights in Works By Animals Assuming the Works can be Protected

A. Overview of the Legal Status of Animals

An overview of the legal status of animals is helpful to an understanding of ownership issues. The general rule is that an animal is considered property under the law.[286] However, at least one court has held that "a pet is that not just a thing but occupies a special place somewhere in between a person and a piece of personal property."[287] Moreover, while an animal can be the beneficiary of a trust,[288] an animal cannot inherit under a will.[289] Therefore, it seems that the general rule is that an animal cannot own property because of its legal status as property. However, copyright should be an exception to this general rule. If an animal is personally creating something of value, it should be able to reap the benefits of its creation. Therefore, an animal should be able to own the copyright in a work that it has created.

B. Comparison Between Animals and Children

In addition, an analogy can be drawn to the creative works of children. The Copyright Office states that a minor can claim copyright in a work.[290] Furthermore, the Copyright Office will issue a registration for a copyright to a minor.[291]

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[286] *See, e.g.*, Fackler v. Genetzky, 595 N.W.2d 884, 891-92 (Neb. 1999); Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981). Many state statutes provide that animals are personal property. *See, e.g.,* Ga. Code Ann. § 44-1-8 (a) (2008); Ala. Code § 3-9-2 (b) (2008).

[287] Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979). Later cases have generally refused to follow *Corso*. *See* Gluckman v. Am. Airlines, Inc., 844 F.Supp. 151, 158 (S.D.N.Y. 1994) (stating that *Corso* is an "aberration[ ] flying in the face of overwhelming authority to the contrary"); *see also* Oberschlake v. Veterinary Assoc. Animal Hosp., 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) (declining to follow *Corso*). Nevertheless, the status of animals as property may indeed be changing. *See supra* Part III.A and note 189.

[288] *See supra* text accompanying note 181.

[289] Hembree v. Quinn, 444 P.2d 353, 363 (Cal. 1968).

[290] U.S. Copyright Office—Who Can Register? (FAQ)—http://www.copyright.gov/help/faq/faq-who.html (last visited Jan. 4, 2011).

[291] *Id.*

Moreover, the copyright law allows for children to own an interest in a copyright.[292] Therefore, just as the copyright law allows for a child to copyright a work and own the copyright, an animal that creates a work should be able to have an ownership interest in the copyright for that work.

An additional comparison can be made to children who enter into entertainment related contracts. The general rule is that a parent is entitled to the earnings of his or her minor child.[293] However, California law provides an exception to this rule under certain circumstances.[294] In California, any earnings obtained by a minor child as a result of contracts for artistic or creative services remain the sole property of the child.[295] Moreover, the law mandates that the employer set aside fifteen percent of a minor performer's gross income in a trust fund.[296] The child's parent or guardian becomes trustee of the funds and takes on a fiduciary duty.[297] The parent or guardian must manage the funds for the benefit of the child.[298] The court maintains jurisdiction over the trust account and has the power to change or end the trust upon request of the parties.[299]

Although an animal does not enter into a formal contract to provide artistic services, there is an argument that the general purpose behind the California approach, namely, the protection of children,[300] should still apply in the case of animal works. Animals can be compared to children who are seen under the law as requiring protection and lacking in the capacity to manage their own affairs.[301] Just as in the case of children who enter into contracts for artistic services,[302] if an animal is deemed to be the owner of the copyright in its own work, the animal should be allowed to own its earnings that result from such efforts. Therefore, just

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[292] *See, e.g.*, 17 U.S.C. § 304(C)(ii) (West 2005); *Id.* § 203.

[293] Cal. Fam Code § 7500 (West 2004).

[294] *See Id.* §§ 771(b) and 6750(a)(1).

[295] *See Id.* The law states, "'Artisic or creative services' includes [Sic], but is not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer." *Id.* § 6750(a)(1). Arguably, a contract for a work of art such as a painting could fall under this statute because it is an artistic service. Moreover, by stating that it is not limited to the listed services, the statute indicates that the list of sample services is not exhaustive. *Id.*

[296] *Id.* § 6752(d)(1). If court approval of the child's contract is obtained, the law requires that the judge order the employer to set aside fifteen percent of the child's gross earnings in trust. *Id.* § 6752(b)(1).

[297] *Id.* § 6752(d)(1).

[298] *Id.*

[299] *Id.* § 6752(d)(5).

[300] *See* Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 McGeorge L. Rev. 201, 204-07 (2000).

[301] *See* Restatement (Third) Of Property § 8.2 (2008) (stating that minors do not have capacity to make wills or gifts); Restatement (Second) Of Contracts § 14 (2008) (noting that contracts entered into by minors are voidable); *see also supra* text accompanying notes 173-74.

[302] *See supra* text accompanying note 295.

as a parent must act as trustee for his or her artistic child's trust income,[303] the zoo or research institution should have obligations to act in the animal's best interests when the animal has an ownership interest in the copyright of its work.

There are several possibilities for ownership of the copyright in animal art. One is that the work could be considered a work made for hire in which the zoo or research institution would own the copyright. Another possibility is that the art is a joint work, in which case the animal and the zoo or research institution would be co-owners of the copyright. Finally, the work may be one of individual authorship owned by the animal.

C. Works Made for Hire

One possible way to categorize animal art is as a work for hire. In a work made for hire situation, the person for whom the work was created, typically an employer, is considered to be the author of the work.[304] Moreover, absent an agreement to the contrary, the employer-author owns the copyright in the work.[305] The requirements for a work for hire under the 1976 Act are different from those of the 1909 Act.[306] This section outlines the requirements for a work made for hire under each act and analyzes whether animal art can be classified as such.

D. Works for Hire Under the 1909 Act

In interpreting the 1909 Act, courts have held that the person at whose instance and expense the work was done is considered to be the author of the work and owner of the copyright, absent an agreement to the contrary.[307] Two factors that the court looks to in order to determine if the work was created at the instance and expense of a party is whether that party was the motivating factor in creating the work and whether that party had the right to supervise and control the creation of the work.[308]

As noted above, animal art that was created before January 1, 1978, falls under the 1909 Act.[309] There are strong arguments that animal works in this category would be works made for hire. The zoo or research institution is the motivating factor in creating the work because, without the contributions of the humans, the animals would not be able to create any works. On the other hand, the motivating factor in creating the work could be the animal's mere desire to create the art,

[303] *See supra* text accompanying notes 297-98, 393-94, and 397-98; *supra* note 397.
[304] 17 U.S.C. § 201(b) (West 2005). The 1976 Act provides that a copyright initially vests in the author or authors of a work. *Id*. § 201(a).
[305] *Id*.
[306] *See* Playboy Enter., Inc. v. Dumas, 53 F.3d 549, 557 (2d Cir. 1995).
[307] *See id*. at 554; *accord* Dolman v. Agee, 157 F.3d 708, 712 (9th Cir. 1998) (citing Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965)).
[308] *See Playboy*, 53 F.3d at 554.
[309] Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, 380 F.3d 624, 632 (2d Cir. 2004); *see also supra* text accompanying note 197.

especially in cases where the animal is not forced to create and is left to create as it sees fit.

In addition, there are arguments that the zoo or research institution has the right to control and supervise the work because the animal is on the institution's property under the supervision of a keeper. Moreover, the human could take away the animal's materials at any time, exercising ultimate control over whether the work is created. Furthermore, the institution controls which materials are provided to the animal. However, the humans do not force the animals to paint certain subjects or in certain styles. These creative decisions are left up to the animal.

Although there are arguments on both sides, animal works should be considered works for hire under the 1909 Act because the works were done at the instance and expense of the institution. The mere presentation of materials to the animal can be seen as a request by theinstitution to create, and the institution covers the cost of all of the materials.[310]

E. Works for Hire Under the 1976 Act

Works for hire are treated differently under the 1976 Act.[311] Under the 1976 Act, a work made for hire is:

> 1 a work prepared by an employee within the scope of his or her employment; or
> 2 a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[312]

This statutory language indicates that the first part of the definition applies only to employees, while the second part of the definition applies to those who are commissioned to create a work, namely, independent contractors.[313]

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[310] Mr. Jiggs, the chimp photographer, is a good example of a work made for hire under the 1909 Act. Clients hired Mr. Jiggs to take photographs at their parties and social occasions. *See supra* text accompanying notes 29-30. These photos were clearly taken by Mr. Jiggs at the instance and expense of Mr. Jiggs' clients. As a result, the clients would own the copyrights in these photographs. *See* Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 553 (2d Cir. 1922) (holding that company that procured and paid for photographs held right to copyright photographs); *accord* Livingston v. Morgan, No. C-06-2389, 2007 WL 2140900, at *5 (N.D. Cal. July 25, 2007) (failing to find work for hire for photographs where there was insufficient evidence to support a finding that photos were taken at instance and expense of publication).

[311] *See Playboy*, 53 F.3d at 557.

[312] 17 U.S.C. § 101 (West 2005).

[313] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

F. Works for Hire—Employees

1. General Considerations

The 1976 Act does not define "employee."[314] As a result, in *Community for Creative Non-Violence v. Reid*,[315] the Supreme Court decided that, in drafting the 1976 Act, Congress incorporated the definition of "employee" used in agency law because of Congress' reference to "scope of employment," a term commonly used in the law of agency.[316] The Supreme Court went on to enunciate the factors that should be considered when deciding whether a hired party is an employee using the law of agency.[317] These factors include: the hiring party's right to control the manner and means by which the work is created, the skill required to create the work, the provision of employee benefits, the tax treatment of the hired party, whether the hiring party has the right to assign additional projects to the hired party, the source of the instrumentalities and tools used to create the work, the location of the work, the duration of the relationship between the parties, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, and whether the hiring party is in business.[318]

None of the factors is determinative of whether the work is a work made for hire.[319] However, later court decisions have held that not all factors carry the same weight and that some factors will be irrelevant in some cases.[320] In *Aymes v. Bonelli*,[321] the court held that the first five factors will almost always be relevant and should be accorded greater weight.[322] These factors are: the hiring party's right to control the manner and means by which the work is created, the skill required to create the work, the provision of employee benefits, the tax treatment of the hired party, and whether the hiring party has the right to assign additional projects to the hired party.[323] However, these five factors may not be the most significant in every case.[324]

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[314] *Id*. at 739.
[315] 490 U.S. 730 (1989).
[316] *Id*. at 740.
[317] *Id*. at 751-52.
[318] *Id*.
[319] *Id*. at 752.
[320] *See* Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992); *accord* Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 110-11 (2d Cir. 1998); Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc., 58 F.3d 1093, 1096 (6th Cir. 1995).
[321] 980 F.2d 857 (2d Cir. 1992).
[322] *Id*. at 861.
[323] *Id*.
[324] SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000).

2. Is the Animal an Employee of the Zoo/Research Institution? An Application of the Reid Factors

It is not clear whether the factors that the Supreme Court outlined in *Reid*[325] could also be applied to situations involving nonhuman creators. Assuming that these factors are applicable in nonhuman situations, the next section applies each factor to the case of animal art in order to determine if the animal can be considered an employee of its zoo or research institution.

a. Hiring party's right to control the manner and means by which the work is created

In order for this factor to weigh in favor of finding that the creator of the work is an employee, rather than an independent contractor, there must be evidence that the hiring party participated in the creative choices.[326] The more control over the work the hiring party is able to exert, the more likely it is that the creator is an employee.[327] In the case of animal art, there is an argument that the hiring party completely controls the manner and means by which the animal creates the art by deciding what materials to offer to the animal and when to offer them. In doing so, the hiring party does exercise some creative input. On the other hand, the hiring party does not exercise any control over what the animal chooses to depict in the art.[328] Moreover, the hiring party does not decide when the work is complete.[329] Therefore, this factor is indeterminate.

b. Skill required to create the work

The more skill that is required to create the work, the more likely it is that the creator is an independent contractor, rather than an employee.[330] Courts have held that architects, photographers, sculptors, and artists have special skills and are, therefore, independent contractors.[331] One argument with regard to animal art is that the animal artist creates it, and artists are considered by courts to be independent contractors. However, animal art does not require any special skills or training. In addition, the animal art is not complex or involved. Therefore, this factor weighs in favor of finding that the animal is an employee.

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[325] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).
[326] *SHL Imaging*, 117 F. Supp. 2d at 313.
[327] *See id*.; *see also* Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 113 (2d Cir. 1998) (noting that this factor weighed in favor of hiring party because employer was able to control the work "to the smallest detail").
[328] *See supra* text accompanying notes 65 and 86.
[329] *See supra* text accompanying notes 39-40, 65, 86, 131, and 133.
[330] *See Reid*, 490 U.S. at 752; *see also Langman Fabrics*, 160 F.3d at 113.
[331] Aymes v. Bonelli, 980 F.2d 857, 862 (2d Cir. 1992); *see also Reid*, 490 U.S. 730, 752 (1989) (noting that a sculptor is a skilled occupation); *Langman Fabrics*, 160 F.3d at 113 (finding that this factor weighed in favor of an artist who drew designs for textiles).

c. The provision of employee benefits

The provision of benefits weighs in favor of finding that the creator is an employee.[332] Employee benefits include health insurance, travel expenses, life insurance, and unemployment benefits.[333] Formally, the animals do not receive named benefits specifically allocated for things such as health insurance or travel expenses. However, the institution does provide for all of the animal's needs, such as food, health care, housing, and treats. As a result, this factor weighs in favor of the hiring party.

d. The tax treatment of the hired party

The withholding of taxes by the hiring party from the creator indicates that there is an employee-employer relationship.[334] It is not clear how many animal artists are required to pay taxes. In the case of Betsy, because of the extent of her earnings, the zoo obtained a dispensation from the Internal Revenue Service.[335] Ultimately, Betsy was not required to pay taxes because all of her income was donated to the zoo.[336] The zoo was probably not withholding taxes from Betsy's income in order to cover her taxes as it likely does with its human employees. However, the zoo took care of Betsy's tax situation by obtaining the dispensation, just as an employer that withholds taxes from an employee helps to ensure that the employee's tax obligations are met. Therefore, while the outcome of this factor will depend on the specific facts, it is likely to weigh in favor of the institution because the institution is managing the animal's finances.

e. Whether the hiring party has the right to assign additional projects to the hired party

If the hiring party has the right to assign additional projects to the creator, the creator is more likely to be an employee.[337] This argument is similar to the first factor. The hiring party continues to provide the animal with the means to create

[332] *Langman Fabrics*, 160 F.3d at 113.

[333] *Id.*; *see also* Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, 380 F.3d 624, 641 (2d Cir. 2004).

[334] *See Reid*, 490 U.S. at 753 (noting that fact that hiring party did not pay payroll or Social Security taxes indicated that creator was independent contractor); *see also Aymes*, 980 F.2d at 862 (indicating that failure of hiring party to pay payroll taxes was highly indicative that creator was independent contractor).

[335] *See supra* text accompanying note 69.

[336] *See supra* text accompanying note 70. Query whether Betsy may have preferred a different arrangement in which she was able to spend her money on herself.

[337] *See Reid*, 490 U.S. at 753 (pointing out that hiring party did not have right to assign additional projects to creator, which weighed against a finding that creator was an employee); *see also Aymes*, 980 F.2d at 863 (holding that hiring party's right to assign other projects was strong evidence that creator was an employee).

works, which could be seen as a right to assign additional projects to the animal. However, the animal decides whether it wants to actually use the materials and create a work. Therefore, this factor carries little weight.

f. Source of the instrumentalities and tools used to create the work

The creator of a work is more likely to be an independent contractor if he or she provides her own equipment.[338] One court indicated that, if the creator selects his or her own equipment, but the hiring party pays for it, then this factor has no bearing on the decision whether the creator is an employee.[339] Moreover, even if all of the equipment is located at the hiring party's offices, this factor carries little weight if the creator is forced to work at the hiring party's premises out of necessity.[340]

For animal art, all of the materials are provided by the hiring party and are located on the hiring party's premises. However, if the animal develops a preference for a certain material, while the hiring party purchases the material, the situation may be similar to that in which the creator selects the equipment but the hiring party pays for it. In this case, the factor would be indeterminate. In addition, there is an argument that the animal is forced to work at the institution out of necessity because, unlike a typical employee, the animal actually lives on the institution's premises. In conclusion, although the animal may create the work on the hiring party's premises out of necessity, this factor weighs slightly in favor of the hiring party because the hiring party does provide all of the materials.

g. Location of the work

If the creator works on his own premises, rather than that of the hiring party, the creator is less likely to be an employee and more likely to be an independent contractor.[341] At least one court has held that this factor carries little weight if the creator was required to work on the hiring party's premises in order to have access to needed equipment.[342] The analysis for this factor is similar to the previous factor. The animal creates all of the works on the hiring party's premises. However, this is necessary because the animal lives at the institution and is not free to go to another place. Therefore, this factor does not carry any weight.

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[338] *See Reid*, 490 U.S. at 752 (finding that fact that creator supplied his own tools weighed in favor of finding that creator was independent contractor).

[339] Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 113 (2d Cir. 1998).

[340] *Aymes*, 980 F.2d at 864.

[341] *See Reid*, 490 U.S. at 752 (finding that fact that creator worked at his own studio, making supervision by the hiring party impossible, weighed against finding that creator was an employee); *see also Langman Fabrics*, 160 F.3d at 113 (holding that fact that creator worked at hiring party's place of business made it more likely that creator was an employee).

[342] *Aymes*, 980 F.2d at 864.

h. Duration of the relationship between the parties

The shorter in time the relationship between the creator and the hiring party, the less likely it is that the creator is an employee.[343] Of course, this factor should be analyzed on a case-by-case basis. While some animals may spend the majority of their lives at one institution, other animals may be moved from place to place. The longer the animal creates works at a specific institution, the more likely it is that the animal can be treated as an employee of that institution.

i. The extent of the hired party's discretion over when and how long to work

The more control the hiring party is able to exercise over the creator's work schedule, the more likely it is that the creator is an employee.[344] This factor carries no weight either way when the creator has some flexibility in deciding when to work, but the hiring party retains control over the work.[345] In the case of animal art, presuming that the animal does not have access to the required materials at all times, the hiring party decides when to present the animal with the materials needed to create a work. Moreover, the hiring party could decide to take away the animal's materials at any time, thereby exercising control over how long the animal works on a project. However, in most instances, the animal decides when a work is completed and does not work on a set schedule like most employees.[346] In addition, even when presented with the materials by the hiring party, the animal may not feel inspired to use them at that time to create a work. Therefore, this factor weighs only slightly in favor of the hiring party.

j. The method of payment

The payment of regular wages supports a finding that a creator is an employee, while lump sum payments weigh in favor of the creator being an independent contractor.[347] This factor is probably irrelevant in the case of animal art because the hiring party does not provide monetary wages or paychecks to the animal.

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[343] *See Reid*, 490 U.S. at 752-53 (noting that fact that creator was only retained for two months made it more likely that he was an independent contractor); *see also* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000) (stating that creator was only hired for one photo shoot, making it less likely that creator is employee); *but see Langman Fabrics*, 160 F.3d at 113 (finding that evidence taken as a whole supported a finding that creator was employee even though creator only worked for hiring party for three months).

[344] *See Reid*, 490 U.S. at 753 (pointing out that creator had absolute discretion over when and how long to work and finding that creator was independent contractor); *see also Langman Fabrics*, 160 F.3d at 113 (noting that creator working regular hours weighed in favor of finding that creator was employee).

[345] *Aymes*, 980 F.2d at 863-64.

[346] *See supra* text accompanying notes 39-40, 65, 86, 131, and 133.

[347] *Aymes* at 863; *see also Reid*, 490 U.S. at 753 (citing Holt v. Winpisinger, 811 F.2d 1532, 1540 (D.C. Cir. 1987)) (describing that fact that creator received lump sum payment dependent on completion of job made it more likely that creator was independent contractor because this is a typical arrangement used by independent contractors).

k. The hired party's role in hiring and paying assistants

The fact that a hiring party has the ability to control the hiring and paying of the creator's assistants makes it more likely that the creator is an employee.[348] This factor is irrelevant when the creator has no need for assistants.[349] With regard to animal art, this factor may be irrelevant because the animal artist may not require any assistants in order to complete the work. However, if the hiring party decided that the animal artist did need an assistant, the hiring party would be in control of procuring that assistant. Moreover, the term "assistant" can be viewed more broadly to encompass trainers, researchers, and keepers that the institution may hire to help care for and supervise the animal artist. Using this broader definition, this factor weighs in favor of the hiring party.

l. Whether the work is part of the regular business of the hiring party

If the creator performs tasks that directly relate to the objective of the hiring party's business, then this factor militates in favor of a finding that the creator is an employee.[350] The *Aymes* court pointed out that this factor is generally irrelevant because companies hire numerous support staff employees whose work does not necessarily relate to the regular business of the company, such as secretaries and accountants.[351] Therefore, the mere fact that a creator does not work in the regular business of the company may not be indicative of whether the creator is an independent contractor.[352]

Arguably, a zoo or research facility is not in the business of creating animal art. Typically, the purposes of these institutions are to educate the public and to study, protect, and help conserve animals.[353] Therefore, the animal's creation of art may not directly relate to these objectives. On the other hand, animal art does have educational and research benefits. Animal art provides evidence of the creative and cognitive abilities of the animals and can help researchers to better understand the animals. Moreover, the sale of animal art helps to support the institution's

[348] *See Reid*, 490 U.S. at 753 (finding that creator was independent contractor when he had total discretion over hiring and paying assistants); *see also SHL Imaging*, 117 F. Supp. 2d at 314 (finding that creator was independent contractor when hiring party did not pay or hire any of creator's assistants).
[349] *Aymes*, 980 F.2d at 864.
[350] *Id*. at 863 (providing an example of work that would be considered to be done in firm's regular business as a computer programmer employed by a software company); *see also* Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, 380 F.3d 624, 641 (2d Cir. 2004) (noting that creation of choreography by creator was part of regular activity of hiring party); *SHL Imaging*, 117 F. Supp. 2d at 314 (finding that creator was independent contractor where creator was a photographer and hiring party's business was the creation and sale of picture and mirror frames).
[351] 980 F.2d at 863.
[352] *Id*.
[353] *See* About the Zoological Society of San Diego, San Diego Zoo, http://www.sandiegozoo.org/disclaimers/aboutus.html (last visited Jan. 4, 2011).

objectives. As a result, the creation of art by the animal does directly relate to the objectives of the hiring party, and this factor weighs in the hiring party's favor.

m. Whether the hiring party is in business

A creator is more likely to be considered an employee if the hiring party is a business.[354] A research institution may most closely resemble the nonprofit organization found in *Reid* because it is not a business, although the institution does need money to conduct the research. However, a zoo will likely be considered a business because, although it is devoted to research, conservation, and education, zoos charge admission fees and hold fundraisers to make money. Therefore, a zoo will be considered as being in business, but a research institution may not be.

As a result, in the case of a zoo, this factor will weigh in favor of the institution. However, in the case of a research institution, this factor is likely to weigh in favor of the animal.

n. Is the animal an employee?

In sum, while some factors are indeterminate, the first five factors tend to support a finding that the animal should be seen as an employee. Moreover, while a few remaining factors carry no weight or may weigh in favor of the animal in certain circumstances, the factors weighed as a whole support the conclusion that the animal is an employee of the institution.

3. If the Animal Is an Employee, Is the Animal Acting Within the Scope of Its Employment?

Once it is determined that the creator is an employee, the next step in deciding whether there is a work for hire is to determine whether the employee was acting within the scope of his or her employment when that employee created the work.[355] If the employee was acting within the scope of his or her employment, the statutory requirements will be met, and the hiring party will be considered the author of the work and the owner of the copyright in the work.[356] Courts use the factors found in agency law to decide whether an employee is acting within the scope of his or her employment.[357] Agency law indicates that an employee acts

[354] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989) (finding that fact that hiring party was not a business, merely an organization devoted to eradicating homelessness, weighed in favor of finding that creator was independent contractor).

[355] 17 U.S.C. § 101 (West 2005).

[356] *Id*.; *Id*. § 201(b).

[357] *See Reid*, 490 U.S. at 739-40 (holding that Congress' use of term "scope of employment" demonstrates Congress' intent for agency law to be applied); *see also* Avtec Sys., Inc. v. Peiffer, 21 F.3d 568, 571 (4th Cir. 1994) (noting that agency law should be applied to determine whether employee acted within scope of employment).

within the scope of his or her employment only if: (1) the work is of the type for which the employee was hired to perform; (2) the creation of the design occurred "substantially within the authorized time and space limits" of the job; and (3) it was "actuated, at least in part, by a purpose to serve" the employer's interests.[358] Another factor that courts examine is whether the hiring party had the right to supervise and control the manner in which the work was created.[359]

a. Work is of the kind servant is employed to perform

There is an argument that creating artworks is the kind of work that animals are employed by zoos to perform. Zoos employ animals to entertain and educate the public and to serve as research subjects for the benefit of science. Therefore, creating artworks that the public enjoys and that the researchers are able to study is the kind of work that the animal is employed to perform.

Even if one argues that the creation of art works is not the kind of work the animal is employed to perform, the creation can be considered as an act incidental to an authorized act. Acts that are incidental to authorized acts may also be within the scope of employment.[360] An incidental act is an act that is subordinate or pertinent to an act that the employee is hired to perform.[361] The incidental act must serve the objective of the employer and must not be an act that the employee is not likely to perform.[362]

> While the authorized act may just be that the animal make itself available for research and entertainment purposes, the creation of art can be seen as pertinent to this authorized act. Moreover, the incidental act of creating art serves the objective of the employer because the art entertains the public, raises funds, and provides research opportunities. Finally, the incidental act is something that the animal is likely to perform because many animals create art, and creating art is not something that is outside of the animal's capabilities. Therefore, this factor supports the conclusion that the animal is acting within the scope of its employment.

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[358] Restatement (Second) of Agency § 228 (1958); *accord* McKenna v. Lee, 318 F. Supp. 2d 296, 300 (E.D.N.C. 2002). The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency. The Restatement (Third) provides:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

Restatement (Third) of Agency § 7.07(2) (2006). The factors from the second Restatement will be used here because this is the test that many court decisions have interpreted and applied. *See, e.g.*, *Avtec*, 21 F.3d at 571-72; Miller v. CP Chem., Inc., 808 F. Supp. 1238, 1243-44 (D.S.C. 1992).

[359] Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969).

[360] *Miller*, 808 F. Supp. at 1243 (quoting Restatement (Second) of Agency § 229 cmt. b (1958)).

[361] *Id.*

[362] *Id.*

b. Work occurs substantially within the authorized time and space limits

The creation of animal art occurs solely on the employer's premises. However, the animal is not free to create art at another location, so this should not be heavily weighed. In addition, as noted previously,[363] the employer decides when to present the animal with the materials, but the animal decides when the work is complete. The animal does not work on a set schedule like most employees. Therefore, this factor is indeterminate.

c. Work is actuated, at least in part, by a purpose to serve the master

In order to satisfy this element, the hiring party must show that the creator was motivated, at least in part, by a desire to further the corporate goals of the hiring party.[364] Animals do not understand the notions of corporations or mission statements. However, when presented with art materials, the animals may feel the need to create in order to please their keepers and receive praise, attention, or treats. On the other hand, some animals do not feel the impulse to create, even when presented with materials.[365] Moreover, it seems that some animals create art for their own gratification.[366] In conclusion, this factor likely weighs in favor of the hiring party because most animals are likely motivated, at least in part, by a desire to do what their keepers ask of them.

d. Hiring party's right to supervise and control

This analysis is very similar to the one under the 1909 Act.[367] Arguably, the employer possesses the right to control and supervise the work because all of the work is done on the employer's premises and is supervised by a human employee. The employer has the ability to control the creation of the work by providing materials of its own choosing at a time that it sees fit. Moreover, the human has the ability to remove the animal's materials. On the other hand, the employer does not force the animals to paint a certain way. Rather, these creative decisions are left up to the animal. In conclusion, the factor seems to weigh in favor of finding that the animal is acting within the scope of its employment because most arguments favor the employer.

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[363] *See supra* Parts V.F.2.a and V.F.2.i; *see also supra* text accompanying notes 39-40, 65, 86, 131, 133, and 346.

[364] Avtec Sys., Inc. v. Peiffer, 21 F.3d 568, 572 (4th Cir. 1994).

[365] *See, e.g., supra* text accompanying notes 24 and 72.

[366] *See, e.g., supra* text accompanying notes 26, 110, and 143. For years, Alpha, a chimpanzee, regularly begged for materials she could use for drawing. SocialFiction.org, http://www.socialfiction.org/img/monkeyart1.png (citing J. of Comp. & Physiological Psychol.) (last visited Nov. 25, 2008). Once, she drew on a leaf when she could not obtain paper. *Id.* Alpha was never rewarded for her drawings. *Id.* In addition, Alpha would ignore food if there was a chance to get paper and pencil instead. *Id.* It seems clear that Alpha possessed an innate desire to create art. *Id.*

[367] *See supra* Part V.D.

e. Does the animal act within the scope of its employment?

Four out of the five factors support a finding that the animal is acting within the scope of its employment, with one factor being indeterminate. Therefore, the animal is most likely an employee acting within the scope of its employment, and the creations are works made for hire. This means that the zoo or research institution that owns the animal would be deemed the author of the animal's works.[368] In addition, the institution would also own the copyrights in these works.[369]

G. Requirements For Works For Hire—Independent Contractors

1. General Considerations

The second part of the definition of work made for hire provided in the 1976 Act applies to independent contractors.[370] In order for an independent contractor to create a work for hire, the work must be "specially ordered or commissioned" by the hiring party.[371] Also, there must be a signed writing between the independent contractor and the hiring party indicating that the work is to be considered a work made for hire.[372] In addition, the work must fall into one of the nine categories that are enumerated in the statute.[373] Furthermore, the meaning of "specially ordered or commissioned" is the same as the meaning of "instance and expense" under the 1909 Act.[374] In essence, a work is "specially ordered or commissioned" when the hiring party is the motivating factor in the creation of the works.[375]

2. If the Animal Is Not an Employee Acting Within the Scope of Its Employment, Are the Requirements For an Independent Contractor Work For Hire Met?

Animal art could be considered "specially ordered or commissioned" because there are strong arguments that the animals create the works at the "instance and expense" of the institutions.[376] However, pictorial work is not found among the enumerated categories of works in the statute.[377] Despite this fact, there may be an

[368] *See* 17 U.S.C. §§ 101, 201(b) (West 2005).
[369] *See Id*.
[370] *Id*. § 101; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989); *supra* text accompanying note 313.
[371] 17 U.S.C. § 101.
[372] *Id*.; *see also* Playboy Enter., Inc. v. Dumas, 53 F.3d 549, 558 (2d Cir. 1995).
[373] 17 U.S.C. § 101; *see also Playboy*, 53 F.3d at 561.
[374] *Playboy*, 53 F.3d at 562.
[375] *Id*. at 563.
[376] *See supra* Part V.D.
[377] *See* 17 U.S.C. § 101.

argument that animal art can be considered a collective work,[378] which would place the work within the specified categories.[379] Each work that an animal creates can be viewed as an independent contribution to the animal's portfolio, just as photographs could be considered as individual contributions to a photo album. The portfolio and photo album can be seen as collective works because they are collections of independent works, namely, artworks and photographs.

Nevertheless, the writing requirement[380] would not be satisfied. Even though Koko may be able to write,[381] she would not be able to understand and agree to a contract with her research institution.[382] Therefore, animal art could not be considered a work for hire under the section of the 1976 Act that applies to independent contractors.

H. Does the Holding In Urantia Apply When the Work Is a Work For Hire?

The *Urantia* court specifically noted that the work at issue in that case was not a work made for hire.[383] As a result, its holding that a work must contain an element of human creativity[384] may not apply in a work made for hire situation. This means that, because animal works are likely works for hire, the facts in animal art cases would be distinguishable from those in *Urantia*. In addition, the 1976 Act, and case law applying the 1909 Act, specifically allow a nonhuman corporation to be an author in the case of works made for hire.[385] Finally, the 1976 Act does not state that the creator of a work must be a human being or that the work must contain an element of human creativity. In light of these considerations, there is an especially strong case to be made for the copyright eligibility of animal works made for hire. First, the facts would be distinguishable from those of *Urantia*. In addition, the 1976 Act does not expressly prohibit nonhuman creators and is amenable to nonhuman authors.

[378] "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Id*.
[379] *See Id*.
[380] *Id*.
[381] *See supra* text accompanying note 94.
[382] Koko is able to understand ASL and spoken English. *See supra* text accompanying note 87. It is very unlikely that she would be able to comprehend written English.
[383] Urantia Found. v. Maaherra, 114 F.3d 955, 961 (9th Cir. 1997).
[384] *See supra* text accompanying notes 277-78.
[385] *See* 17 U.S.C. § 201(b); *see also* Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 553 (2d Cir. 1922) (holding that defendant corporation held right to copyright photographs that it procured and paid for); Irving J. Dorfman Co. v. Borlan Industries, Inc., 309 F. Supp. 21, 23 (S.D.N.Y. 1969) (providing that plaintiff corporation could be considered author of lace design).

I. Can the Animal and the Zoo/Research Institution Be Considered Joint Authors?

If animal art is not a work for hire, another possibility is that the work could be considered one of joint authorship between the animal and the zoo or research institution. Joint authors are co-owners of the copyright in the work.[386] A joint work is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[387] Furthermore, in *Childress v. Taylor*,[388] the Second Circuit increased the requirements for a joint work and held that, in addition to meeting the statutory requirements,[389] each contribution to the work must be independently copyrightable,[390] and each contributor must intend to be a joint author.[391] The court noted that one factor to examine in order to determine if there is an intent to be joint authors is whether both parties received billing or credit for the work.[392]

While animal art may meet the statutory requirements, it cannot satisfy the heightened requirements of *Childress*. The contributions of the animal and the human may be inseparable because the animal could not create the work without the materials. In addition, it is possible that the animal and the human keeper have the intent to merge their contributions because the human knows that the creative selections he or she makes will affect the creation of the work by the animal. Likewise, the animal expects that the human will provide it with the materials needed to create a work. However, the human's mere creative selection of materials to provide to the animal is not independently copyrightable. Finally, there is no intent on the part of the human to be considered an author of the work. The human gives the animal full credit for the art.

Therefore, depending on the standard applied by the court, animal art may or may not be a joint work. If it is a joint work, this should raise obligations on the part of the zoo or research institution to care for the animal's copyright interests and to account to the animal for any profits derived from the use of the copyright.[393] These obligations can be compared to the obligations of parents who act as trustees on behalf of their children who enter into contracts for creative services.[394]

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[386] 17 U.S.C. § 201(a).

[387] 17 U.S.C. § 101. Parts of a whole are inseparable when they have little meaning standing alone. Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991). On the other hand, parts of a whole are interdependent when they do have some meaning on their own but are most significant when combined with the other contribution. *Id*. An example would be the lyrics and music of a musical composition. *Id*.

[388] 945 F.2d 500 (2d Cir. 1991).

[389] *See Id*. at 507.

[390] *Id*.

[391] *Id*. at 508-9.

[392] *See id*. at 508.

[393] *See* Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998) (noting that each joint author has duty to account to other joint author for profits collected from use of the work). If the institution exploits the copyright, it should be obligated to set up a trust for the animal's share of the profits. *See supra* text accompanying notes 297-98 and *infra* text accompanying note 398.

[394] *See supra* text accompanying notes 297-98 and 303.

J. Can the Work be One of Individual Authorship?

The final ownership possibility is that the work is one of individual authorship. Assuming there is no agreement to the contrary, such as a work for hire agreement, the author is the creator of the work, that is, the party that creates the fixed, original expression capable of copyright protection.[395] The 1976 Act provides that ownership of the copyright initially vests in the author or authors of the work.[396]

In the case of animal art, in the absence of a work made for hire or a work of joint authorship, the animal will be the sole owner of the copyright because it is the animal that creates the copyrightable work. This should raise obligations on the part of the zoo or research institution to protect the animal's ownership interest in the copyright and to manage the animal's finances.[397] In this event, similar to the situation that would exist if the work were found to be a joint work, the institution should be required to maintain a trust for the animal.[398] This trust would be enforceable due to the changes in the Uniform Trust Code.[399]

V. Conclusion

Animal art is a growing area in the art world. Many animals create works that involve substantive creative choices. These works satisfy the legal requirements for copyright protection in the United States and are deserving of protection. In addition, while most of these works are likely to be works made for hire, the institutions that own animal artists should be obligated to treat their animal artists with dignity and respect.

Two hundred years ago, no one would have believed that a painting of a can of soup or a canvas painted a solid color would hang on the walls of the finest museums in the world. Two hundred years from now, people will still be talking about the Tate Britain and the Tate Modern. But they may also be talking about the Tate...Animal.

[395] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

[396] 17 U.S.C. § 201(a) (West 2005); *accord Reid*, 490 U.S. at 737; *see also supra* note 304 and text accompanying notes 304-05 for a discussion of authorship in the work for hire context.

[397] Again, this obligation is similar to the obligation of the parent of a creative child that provides artistic services where the parent must act as trustee on that child's behalf. *See supra* text accompanying notes 297-98, 303, and 393-94 and *infra* text accompanying note 398.

[398] *See supra* text accompanying notes 297-98, 303, 393-94, and 397.

[399] *See supra* note 181 and accompanying text.

Apple Chase by Michael
Gorilla Foundation—Gorilla Art,
http://www.koko.org/friends/popup_art_apple.html (last visited Jan. 4, 2011).

Abstract Work by Cheeta
Flickr—http://farm1.static.flickr.com/13/18447616_d93bf8e6f5.jpg
(last visited Jan. 4, 2011).

Bird by Koko
Gorilla Foundation—Gorilla Art
http://www.koko.org/friends/popup_art_bird.html (last visited Jan. 4, 2011).

Pink Pink Stink Nice Drink by Koko
Gorilla Foundation—Gorilla Art,
http://www.koko.org/friends/popup_art_pink.html (last visited Jan. 4, 2011).

Strategic Litigation and Law Reform*

Graeme McEwen†

The principal challenge for lawyers who wish to advance the animal cause is two-fold. One, the formulation and conduct of strategic litigation. Two, the prosecution of law reform proposals on the basis that animal protection should be primarily a Commonwealth responsibility.

So what is strategic litigation? We know that by reason of the sanction by state animal protection statutes of producer friendly 'codes of practice' that their protective reach is denied to the overwhelming mass of animals, some 500 million animals annually. For example, the code of practice for domestic poultry permits the confinement of a battery hen to a floor area less than an A4 sheet of paper. Such enduring close confinement would ordinarily give rise to a cruelty offence under a statute. As such confinement complies with the relevant code of practice however, the Act does not apply.

With welfare thresholds for intensively produced animals so low, prosecution is difficult. Accordingly, the lawyer is compelled to turn to more creative legal strategies. For example, section 52, *Trade Practices Act* 1974[1] prohibits misleading and deceptive conduct by a corporation in trade or commerce. Suppose, for example, that major players in an industry were to market their animal products on the basis that the animals were raised in ideal or enriched conditions, when in fact they were not. A case could be brought against such companies for engaging in misleading and deceptive conduct. What would be the point? Apart from serving the public interest generally, it would enable consumers to make an informed choice in their purchase of particular animal products. Afterall, it is a parody of the notion of consumer choice if it is not an *informed* choice. Flowing from that though is the likely prospect that producer practices would change in response to the exertion of market power by informed consumers.

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[1] The *Trade Practices Act* 1974 became the *Competition and Consumer Act* 2010 as of 1 January 2010. There is now reposed in Schedule 2 the new *Australian Consumer Law*. The new s.18 of the *ACL* , for example, contains the new equivalent of the former s. 52, TPA. Other relevant sections have been relocated and their numbering changed. See further chapter 1, 'The Animal Welfare Legal Regime- a critical overview, and chapter 2, ' Three Key Challenges in Strategic Public Interest Litigation', of the author's just published e-book (May 2011), ***'Animal Law : Principles and Frontiers'*** at www.bawp.org.au

There have been three traditional impediments to such public interest litigation. First, the cost and availability of appropriate legal representation. This has been addressed by the establishment of the Barristers Animal Welfare Panel with its adjunct panel of law firms, including national first tier law firms, offering services pro bono. Second, the risk of an adverse costs outcome in a difficult or lengthy case. Third, the requirement to give an undertaking as to damages as a condition of the grant of an interlocutory injunction. [2] In these latter respects, the just established Animal Justice Fund provides, at last, the missing link in the legal armoury.

The Animal Justice Fund will be administered by Animals Australia. Its launch was enabled by a Tasmanian benefactor, Jan Cameron, (founder of the Kathmandu chain) who has offered to provide up to $1 million per year over five years, that is, $5 million in total, to enable the conduct of public interest litigation and, second, the gathering of evidence by rewards of up to $30,000 for evidence which leads to successful prosecution for animal cruelty, or what is judged by the AJF to be a significant animal welfare outcome. The website may be found at www.animaljusticefund.org.

Such rewards are thought to be necessary because, in Victoria for example, the vital power to permit random inspection of premises (such as a battery hen shed housing thousands of birds) lies tightly controlled by the Minister for Agriculture. The power is exercised sparingly. There is the further practical challenge in gathering evidence where one would need a departing employee to make a complaint (infrequent) or the co-operation of the particular producer (unlikely).

There have been three recent major examples of public interest litigation going to the protection of animals under Australia jurisdiction. First, the decision by the Full Court of the Federal Court of Australia in 2006 in *Humane Society International Inc v Kyodo Senpaku Kaishaltd* [2006] FCAFC 116 to grant an interlocutory and, later, a perpetual injunction under s.475 of the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999, against a Japanese company whaling within the waters of Australia's Whale Sanctuary. The Australian Whale Sanctuary was declared in 2000 under that Act. The injunction was granted even though it may have been futile to do so as the Japanese whaler had no registered office or assets in Australia and its ships did not call into Australian ports. The majority of the Full Court (Black CJ and Finkelstein J) said that, despite this, an injunction served the public interest objects of the Act by having an educative

[2] In *Hoffmann-La Roche* v. *Secretary of State for Trade* [1975] AC 295, the House of Lords held, in summary, that the Crown was entitled in that case to an interim injunction without giving an undertaking as to damages where it was suing to enforce what was prima facie the law of the land (i.e. public interest), in contrast to where it may sue to enforce proprietary rights (i.e. private interest), unless the person against whom the injunction was sought could show a strong prima facie case why the Crown should be required to give the undertaking. For an analysis, and how an analogous argument may be adduced to waive the undertaking where an animal society sues to enforce the law of the land , for example, under a public interest provision like the former s. 52, *Trade Practices Act* 1974 (now s. 18 of the *Australian Consumer Law*), see chapter 2, 'Three Key Challenges in Strategic Public Interest Litigation', of the e-book referred to in fn.2

effect. In litigation without a public interest factor, futility would almost invariably be a ground for denial of injunctive relief.

Or again there was unquestionably a public interest object to be satisfied in the secondary boycott case brought by Australian Wool Innovation against Ingrid Newkirk, the animal rights group People for the Ethical Treatment of Animals, and others in the Federal Court in 2005. [3] There are a number of case references, as various applications were made to strike out different parts of the AWI statement of claim on the basis of its insufficiency as a pleading: see *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 (22 March 2005); *Australian Wool Innovation Ltd v Newkirk (No 2)* [2005] FCA 1307 (16 September 2005); and *Australian Wool Innovation v Newkirk (No 3)* [2005] FCA 1308 (16 September 2005). The case was ultimately settled on a basis very favourable to PETA: a copy of the terms of settlement may be found at the BAWP website when it goes live later this month – www.bawp.org.au. It will be recalled that PETA threatened an international boycott of Australian wool products in the face of a failure to adopt or develop alternatives to the mulesing of sheep. Leaving aside questions of animal welfare, the public interest element lay in how the secondary boycott provisions of the *Trade Practices Act* could be used to stifle free speech or protest activity directed to reliance on the exertion of informed consumer choice or market power.

There is one further argument to keep in view in considering the application of the secondary boycott provisions such as s.45D(1), *Trade Practices Act* 1974. In a given case, a persuasive argument could be mounted that the prohibition in s.45D(1) creates a legal restriction on communication, and thus as a statutory provision should be read down or confined in its application by the implied freedom of political communication under the Constitution. A two-stage test was adopted by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-8; 145 ALR 96 at 12 for determining whether a law infringes the implied freedom of political communication under Australia's Constitution. In brief summary, the two-stage test[4] (later slightly modified) is:

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[3] See further chapter 4, ' Secondary Boycotts', of the e-book referred to in fn.2

[4] (a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

(b) secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed in .128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

In *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182 the two-stage test formulated in *Lange* was amended in the statement of the second question by replacing the phrase "the fulfilment of" by "in a manner": per McHugh J (Gummow, Kirby and Hayne JJ agreeing).

(a) first, does the law effectively burden freedom of political communication?
(b) secondly, if the law effectively does so, is the law reasonably appropriate and adapted (or proportionate) to serve a legitimate end?

If the first question is answered "yes" and the second is answered "no", the law is invalid.

In my view, s.45D(1) stands to create a burden because it imposes potentially serious sanctions and an exposure to large damages claims and judgment, including legal costs. To restrict methods of communication and freedom of association where, in the public interest, it is sought to act in concert to target an arguably inimical practice or course of conduct, is to restrict the effectiveness of the freedom of political speech and protest. It also acts to restrict the extent to which new concerns may be brought to the attention of electors. Plainly, the campaigns of animal societies attract criticism of political representatives and public officials.

Secondary boycotts provisions also stand to operate in practice to burden or deny an animal society's opportunity to obtain access to the media so as to transmit a message on political or government matters to other electors: see for example the observations of McHugh J in *Levy v State of Victoria* (1996) 189 CLR 520 at 623; 146 ALR 248 at 274-5.

Further, by its terms, operation and effect, s.45D(1) directly and not remotely restricts or limits communications or freedom of association by way of an interest group acting in concert with fellow concerned citizens or organisations. It would also affect the manner or conditions of the occurrence of such communications. In 2007 the then federal Minister for Agriculture complained of misleading statements by PETA about the mulesing of sheep, and flagged introduction of a Bill to empower the ACCC to bring representative proceedings on behalf of farmers in reliance on the secondary boycott provisions. The Bill was introduced into the parliament, but it later lapsed with the calling of the federal election in 2007. As to the Minister's complaint, with all political discourse, the question of whether a statement is misleading or not will usually depend on one citizen's particular viewpoint as against another. And ultimately, when political representatives refuse to make laws to change particular practices, citizens who disagree are left, practically speaking, to "vote with their feet" and refuse to purchase the product affected by the practice. For example, why should the ordinary citizen be denied the opportunity to "vote with their feet" where urged by free range egg producers not to buy battery hen eggs on the grounds of the birds' suffering?

Moreover, that s.45D(1) may burden political or government communications is supported by the existence of exemptions in s.45DD for environmental protection or consumer protection.

As to the second-stage test in *Lange*, the burden s.45D(1) creates on communication is excessive and disproportionate by reason of the limited exemptions granted to environmental protection and consumer protection, so that s.45D(1) has an

unreasonably wide operation. Section 45DD(3) in providing for these two exemptions only cannot be thought to provide for a wide rubric of public interest matters.

Arguably relevant to both stages of the implied freedom test is that s.45D(1) makes contravention of its terms subject to a pecuniary penalty under s.76 of the *Trade Practices Act* 1974 of up to $750,000 for a body corporate. In addition, damages and injunctions are available under ss.80 and 82 and remedial orders under s.87. Deane J in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 177 observed how potential civil liability and damages and costs:

> "…is likely to represent a much more effective curtailment of the freedom of political communication and discussion than the possibility of conviction of most of the many criminal offences which are punishable by a pecuniary penalty."

Perhaps the most significant recent public interest case in Australia was that of the *Emmanuel Exports* live sheep export case heard before a West Australian Magistrate. This case involved the prosecution of a live sheep exporter for alleged breaches of s.19(1)(iii) of West Australia's *Animal Welfare Act* 2002, which prohibits animals being "transported in a way that causes or is likely to cause unnecessary harm." In a carefully reasoned judgment handed down in February 2008, the Magistrate found the charges proven. But she acquitted the accused on the ground that there was an operational inconsistency between the federal legal regime and the State Act for the purposes of s.109 of the Constitution, where Commonwealth laws are provided to prevail over State laws to the extent of any inconsistency. Unhappily, the Magistrate erred in law on this point: there was no s.109 point.[5] An appeal was lodged in March 2008 to the West Australian Supreme Court by the WA State Solicitor's office. The Barristers Animal Welfare Panel had two counsel give advice to the effect there was no s.109 point. A copy of the Opinion will be available shortly on the Panel's website.

However, the Minister responsible for administration of the WA animal protection statute intervened on political grounds and discontinued the appeal. At the time, the Carpenter government was clearing the decks for a State election. But for this political intervention, a successful appeal would have ensued and a precedent would have been established with far-reaching consequences for the live animal trade.

I am in little doubt that the Barristers Animal Welfare Panel and the Animal Justice Fund will in the future work together on major strategic litigation. One point that has discouraged public interest litigation by animal societies has been the question of standing to sue. Ordinarily, a special interest in the subject matter of the dispute is required to be established: see *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; 28 ALR 247. I believe that a body like Animals Australia for example would likely satisfy this test.

[5] See further chapter 3, Live Animal Exports', of the e-book referred to in fn.2

However, if a proceeding were to be brought for misleading and deceptive conduct under the *Trade Practices Act*, then no such standing to sue issues should arise.[6] Section 80 provides that the Federal Court may grant injunctive relief where, on the application of the Commission, "or any other person" it is satisfied that a person was engaged, or was proposing to engage, in conduct in contravention of a Part V provision such as s.52. Section 163A of the Act also provides that "a person" may institute a proceeding in the Federal Court seeking a declaration in relation to the operation or effect of (among others) a provision of Part V. Thus, in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, the applicant was a stranger to the dispute, having suffered no loss or damage by reason of the respondent's conduct. It simply invoked the jurisdiction conferred on the Federal Court by ss. 80 and 163A in its capacity as a (corporate) person. The High Court determined the appeal on its standing to sue in favour of the applicant.

There have been other interesting developments here and in the UK relevant to animal law. A person may for example come into possession of information which exposes animal cruelty, but which that person knows to be confidential. Ordinarily, such a person would be under a duty at law not to publish it: *Prince Albert v Strange* (1849) 1 Mac&G 25; 41 ER 1171; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 260, 268; or for example in Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1, 10. Typically, the person seeking to protect confidential information will apply for an interlocutory injunction on the grounds of breach of confidence and/or say breach of copyright.

In *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1980) 147 CLR 39; 32 ALR 485 the Commonwealth sought an interlocutory injunction to restrain the publisher of The Age and The Sydney Morning Herald newspapers from publishing extracts from a book and from documents on defence and foreign policy matters, both of which were produced by Commonwealth government departments. The Commonwealth submitted that it was the owner of the copyright in the documents; that the book contained confidential information; that publication would constitute an offence under the *Crimes Act* 1914; and would in some instances prejudice relations with other countries. Mason J granted the interlocutory injunction. However, his Honour did not grant the injunction on the basis of any actual or threatened breach of criminal law, as injunctions in that event are confined to cases where the offence is frequently repeated in disregard of, usually, an inadequate penalty, or to cases of emergency. The Court here followed *Gouriet v Union of Post Office Workers* [1978] AC 435. His Honour found that the degree of embarrassment in Australia's foreign relations was insufficient to justify

[6] See further chapters 2 and 3 of the e-book referred to in fn.2

interlocutory protection of the confidential information. However he found that the plaintiff had made out a prima facie case for copyright infringement.

For our purposes, His Honour interestingly observed (at pages 496-7 of the ALR):

> "It has been accepted that the so-called common law defence of public interest applies to disclosure of confidential information. Although copyright is regulated by statute, public interest may also be a defence to infringement of copyright… Assuming the defence is to be available in copyright cases, it is limited in scope. It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been *acknowledged* that the defence applies to disclosures of things done in breach of national security, *in breach of the law (including fraud) and to disclosure of matters which involve danger to the public*."[7]

The defendants submitted that damages were an adequate remedy and that no injunction should issue. Mason J said (at 497 of the ALR):

> "Infringement of copyright is ordinarily restrained by injunction, and this is because Equity has traditionally considered that damages are not an adequate remedy for infringement. Of course this does not mean that damages are an inadequate remedy in every case or that an injunction should be granted to restrain every infringement."

More recently, there is the decision of interest by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1. Lenah Game Meats sought an interlocutory injunction restraining the Australian Broadcasting Corporation from broadcasting a film of the processor's slaughter operations at a "brush tail possum processing facility". The film was made surreptitiously and unlawfully by reason of trespass, and was given to the ABC to broadcast. The unchallenged evidence was that broadcasting the film would cause financial harm to the processor.

In brief summary, the course of argument before the High Court invoked principles of unconscionablility, the implied freedom of political communication, rights of property, and an emergent tort of invasion of privacy. The privacy argument was quickly dismissed because it is not available to a corporation: see paragraph [132] of the joint judgment of Gummow and Hayne JJ, for example. The question of what may constitute filming of private activity, on the one hand, and what is necessarily public, on the other, was canvassed at some length. Gleeson CJ at paragraph [42] observed:

[7] emphasis added

> "There is no bright line which can be drawn between what is private and what is not… An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford… The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person with ordinary sensibilities is in many circumstances a useful test of what is private."

At paragraph [25] of his judgment, Gleeson CJ noted that it was not suggested that the operations that were filmed were secret, or that requirements for confidentiality were imposed upon people who might see the operations. And it was not contended that the ABC had contravened, or threatened to contravene any statute, unlike the people from whom the ABC received the video. At paragraph [39] of his judgment, Gleeson CJ observed that if the activities filmed were private, then the law of breach of confidence was adequate to cover the case. Notwithstanding that, at paragraph [43] Gleeson CJ concluded:

> 'The problem for the respondent is that the activities secretly observed and filmed were not relevantly private…Of course, the premises on which those activities took place were private in a proprietorial sense…Nor does an act become private simply because the owner of land would prefer that it were unobserved…It may mean that a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private."

Accordingly, the Court examined the principal contention of the respondent invoking unconscionability. In this respect, it was incumbent upon the respondent to explain why the ABC was bound in conscience not to publish.Given that Gleeson CJ found that there was no breach of the law of confidence, he observed at paragraph [55] that: "… the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large."

Of parallel interest are developments in the United Kingdom arising initially from proceedings taken by a biotechnology company to injunct the publication of material taken in breach of confidence and breach of copyright and given to an animal society which then published the material on its website. The decision of the Vice-Chancellor on the interlocutory application is reported as *Imutran Ltd v Uncaged Campaigns Ltd and Anor* [2001] EWHC Ch 31 (11 January 2001).[8] The

[8] See further chapter 5, 'Animals in Research', of the e-book referred to in fn.2

case arose in this way in September 2000. Imutran Ltd, a wholly owned subsidiary of a Swiss owned international pharmaceutical company, was engaged in research into xenotransplantation, that is to say, the replacement of human organs with those of animals, usually pigs. Most of such research was being carried out at a laboratory known as Huntingdon Life Sciences. As xenotransplantation necessarily involved experimental work on animals, it was regulated by the UK *Animals (Scientific Procedures) Act* 1986. Amongst the duties imposed on the Home Secretary by the Act was the duty, when considering an application for a project licence, to weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as a result of the proposed project.

In the northern hemisphere spring of 2000, Uncaged Campaigns Ltd received a package and a CD-Rom containing copies of a large number of documents belonging to Imutran. A director of Uncaged Campaigns Ltd was Daniel Lyons, a then part-time student at Sheffield University for a PhD in the subject area of the ethical and political theory implications of xenotransplantation. Mr Lyons appreciated that the documents came from Imutran and mainly concerned its program of primate xenotransplantation conducted at Huntingdon Life Sciences. Amongst other things, he considered that the documents raised extremely serious questions of animal welfare and the adequacy of regulation of research by the Home Office. He also appreciated the documents were confidential.

Mr Lyons wrote and published on the website "Diaries of Despair: The Secret History of Pig to Primate Organ Transplants" comprising 157 pages of information from Imutran's documents obtained from the unknown source. On 19 September 2000 a journalist with the Daily Express faxed to Imutran three specific questions concerning its program of xenotransplantation to which Imutran replied. A few days later articles appeared in the Daily Express commenting adversely on Imutran's program. They were based on the Diaries of Despair.

An interim injunction was obtained on 26 September restraining UCL and Mr Lyons from infringing Imutran's copyright in its documents and from using or disclosing the information contained in nominated confidential documents. A proviso to the injunction exempted from the prohibition further use or disclosure of information appearing in the Daily Express articles. These injunctions were obtained on 10 October. The interlocutory injunction application came on before the Vice-Chancellor on 18 October 2000. The matter was adjourned for reasons I do not need to deal with today.

In the upshot, the Home Secretary asked the Chief Inspector of the UK RSPCA to examine compliance by Imutran with licence conditions imposed under the *Animals (Scientific Procedures) Act* 1986. The Vice-Chancellor's eventual decision was handed down on 11 January 2001. Imutran in argument had relied upon first, breach of confidence, and second, infringement of copyright. Relevant to both those issues was the proper approach for the Court to adopt in considering an application for interim injunctions in which the right to freedom of expression guaranteed by Article 10, *European Convention on Human Rights*, was material. This depended in turn on the proper construction and application of s.12 of the UK *Human Rights Act* 1998.

Time does not permit me to explore the human rights argument. Suffice to say, in summary, the Vice-Chancellor found that the documents were in their nature confidential, that the defendants knew this was so, and that the defendants knew that Imutran had not known or consented to removal of the documents. The Vice-Chancellor then turned to whether the defendants should be free to publish and campaign with Imutran's confidential and secret documents. Surprisingly, the Vice-Chancellor said:

> "Many of those documents are of a specialist and technical nature suitable for consideration by specialists in the field *but not by the public generally*. Given the proviso to the injunctions sought there would be no restriction on the ability of the defendants to communicate the information to those specialists connected with the regulatory bodies denoted by Parliament as having responsibility in the field."[9]

The Vice-Chancellor went on to find that there had been also a breach of copyright.

What is surprising about the Vice-Chancellor's decision is the adoption of the view that matters of the public interest as to the treatment and welfare of higher primates should be satisfied by reference of the material to appropriate regulatory bodies, but not by publication to the public generally. Further, it appeared that the Home Office had classified severely intrusive procedures as instead "moderate" only, and indeed may have "cosied up" to Imutran in securing the grant of the licence. The UK RSPCA published a report about Imutran's project which was highly critical. Both this report and the Diaries of Despair are available on the web.

Despite its success before the Vice-Chancellor on the injunction application, ultimately Imutran settled the proceeding with Uncaged Campaigns Ltd and Mr Lyons. According to Wikipedia, the papers reveal researchers at Imutran exaggerated the success of work aimed at adapting pig organs for human transplant. It is plain too that the procedures for the hundreds of higher primates used (monkeys and baboons captured from the wild) between 1994 and 2000 were, to say the least, doubtful, and produced an appalling result for their welfare. The diaries remain published and appear at www.xenodiaries.org. The website of Uncaged Ltd is at www.uncaged.co.uk.

Little over a year later the English Court of Appeal in *A v B plc (Flitcroft v MGN Limited)* [2002] EWCA Civ 337 (11 March 2002); [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545; delivered judgment on two appeals, with an entirely different flavour to that of the reasons of the Vice-Chancellor in the *Imutran* case. 'A' was a well known footballer, B was a national newspaper, and C was one of two women with whom A, a married man, "had affairs". Applications for interim injunctions were made by A on the ground of breach of confidence in the context

[9] emphasis added

of particular Articles of the *European Convention of Human Rights*. In summary, the question arose whether a person is entitled to have his privacy protected by the Court or whether the restriction of freedom of expression which such protection involves cannot be justified. [10] But it is not the privacy question which commands interest, but rather the dicta as to public interest publication.[11] They must be read however in the context of UK privacy principles and the impact of the Convention Articles.

Article 8 operated so as to extend the areas in which an action for breach of confidence can provide protection of privacy. Article 10 operated in the opposite direction because it protects the freedom of expression and to achieve that it was necessary to restrict the area in which remedies were available for breaches of confidence. The English Court of Appeal noted:

> "Any interference with the *press* has to be justified, as it inevitably has some effect on the ability of the press to perform its role in society. This is the position *irrespective of whether a particular publication is desirable in the public interest*. The existence of a free press is in itself desirable so any interference with it has to be justified."

This principle arises because the view is taken that it is more important in a democratic society that a press be free from both government and judicial control. Importantly, the Court noted further:"…the existence of a public interest publication strengthens the case for not granting an injunction. Again, in the majority of situations whether the public interest is involved or not would be obvious. In the grey area cases public interest, if it exists, is unlikely to be decisive."

These dicta offer some encouragement for animal lawyers and animal societies, although in Australia the availability of a 'public interest' defence awaits determination by an ultimate appellate court such as the Full Federal Court or the High Court of Australia. Certainly, it is not available presently in Victoria and South Australia by reason of decisions of their respective appeal courts.[12]

When it comes to Australia's implied freedom of political communication, I expect those of you who have studied constitutional law will be familiar with the High Court 'free speech' decision of *Levy v State of Victoria*. [13] Well known campaigner against duck shooting, Laurie Levy, challenged regulations promulgated

[10] The CA's decision and reasoning on the *privacy* question should be taken to be no longer good law. Whilst not expressly overruled by the House of Lords in *Campbell v MGN Limited* [2004] UKHL 22, it is plain that the House of Lords decision now enunciates the law in the UK. The appellant was the well-known fashion model, Naomi Campbell.

[11] For analysis of the 'public interest' defence and its availability in Australia, see chapter 2, 'Three Key Challenges in Strategic Public Interest Litigation', of the e-book referred to in fn.2

[12] See further fn. 7

[13] For a detailed analysis of the case, see chapter 5, 'Constitutional Law Issues in Animal Law', of the e-book referred to in fn.2

under the Victorian *Wildlife Act* by the then Kennett government prohibiting entry into a permitted hunting area during prohibited times without a licence to do so. The prohibited times were the opening weekend when media interest was at its height. Only duck shooters were licensed. Laury Levy relied on a constitutionally implied freedom of political communication. At the commencement of this case the principal progenitors of the implied freedom on the High Court, Mason CJ and Deane , were still members of the Court. However, by the time it came on for hearing, they had retired from the bench. From the standpoint of enunciation of legal tests, the *Levy* decision is satisfactory. But the factual analysis is not. With barely any reasons, it was in effect asserted as a constitutional fact that the threat to public safety was apparent and met proportionately by the Regulations. In the United States Supreme Court by contrast, it would need to have been shown that there was a clear and present danger of such a threat. Levy's counsel argued that a police presence would remove the prospect of such a threat. Such an argument was consistent with high United States authority.

The short point is that there is any variety of interesting case law developing by reason of the attempt by lawyers to further the objects of the animal cause and the patient work of animal societies, including bringing to public notice activities screened from public view, and defending the rights of protestors. Another view can be taken that these cases also represent, in the main, steps taken to invoke the legal armoury to protect the rights or welfare of animals. Suffice to say, lawyers have shown no lack of ingenuity in acting on behalf of their clients in these types of cases.

It is not surprising that cases of the foregoing kind come about where the legal regime for the protection of animals has become so corrupted by producer self -interest. The codes of practice I referred to earlier are formulated within the Australian Primary Industry Ministerial Council system, comprising federal and state Minsters for Agriculture. In turn, their State departments mostly administer the animal protection statutes, despite the most self- evident conflict of interest. The modest role they play in enforcing the statute is thus no surprise. Enforcement of such a wide -ranging public interest statute is instead left substantially to the RSPCA, a charity with limited resources. In an age in which individuals may be backed by a producer body or a fighting fund, how can a charity be expected to risk an adverse costs outcome in a difficult or protracted prosecution. Or offer an undertaking as to damages as a condition of obtaining an interlocutory injunction. Only the State has the resources necessary to enforce such a wide-ranging public interest statute.

This then brings me to the question of law reform, which is at the heart of the animal cause. I am in no doubt that animal welfare should be a Commonwealth responsibility. Presently bandaids are applied by State legislation where radical surgery is required. There is more than adequate constitutional power for the enactment of a national animal welfare act and the establishment of a national statutory authority to administer and enforce the act. I need only cite as examples the trade and commerce power, and the corporations power. A few years ago

Andrew Bartlett of the Democrats introduced into the Senate a national animal welfare bill. It failed. But I am also aware, firsthand, that amongst Commonwealth parliamentarians on both sides there is support for the cause of animal welfare. This coterie of support needs to be built upon so that animal welfare may be viewed as a Commonwealth political issue. This is an exercise in patient lobbying, which the Panel undertakes.

The Barristers Animal Welfare Panel at this moment comprises members of the NSW and Victorian Bars.[14] It was established initially at the Victorian Bar in November 2006 and quickly acquired 90 members, including 25 silks from the commercial and criminal bars. When the Panel is shortly established as a company limited by guarantee, members of the remaining State bars will be invited to join. By August it will be truly national. The Panel's objects and activity reflect principally the two-fold challenge I expressed at the outset of this talk. It also represents protestors.

Importantly too, the Panel has a national Secretariat of some 25 young lawyers, law students, or others with non-legal skills, whose task it is to undertake policy research, assist in the drafting of submissions, attend to administrative work such as the organisation of animal welfare legal seminars, and participate where appropriate in our case program. The national Panel's website will shortly go live at www.bawp.org.au

Lawyers have particular skills and training. As tomorrow's lawyers you will have an informed access to our legal system. You will be exposed continually to the challenge of marshalling and articulating an argument from a forest of facts and paper. These skills, this training, and this informed access are truly an illustration of the maxim that 'knowledge is power'.

The journey ahead offers exciting possibilities. And, as with any great humanitarian cause, a moral firmament exists to inspire. A justice issue exists in which lawyers can confer much needed leverage on the animal cause and in respect of whole classes of animals that are defenceless, without bargaining power, and with little representation, political or legal. That said, their legal representation is beginning to gain momentum. And with successful legal forays, support should build for animal welfare to be viewed as a Commonwealth political issue and responsibility. I hope that at some stage you may join the challenge.

[14] Since this speech was delivered, the Panel now comprises barristers from all the State Bars of Australia.

The French Contribution to Animal Ethics: René Descartes and Victor Hugo*

Andrew Linzey †

I

At first sight, it might appear that France is one of the countries least likely to give much credence to animal ethics or animal theology.

French attitudes to animals are as unfriendly as they are in most European countries, arguably more so. While there are some laws against animal cruelty, as there are in all states of the European Union, the barbaric use of animals continues. France has the largest number of hunters in Europe e with one and a half million hunting license holders.[1] After the US and Japan, France conducts more experiments on animals than any other country world-wide.[2] The French notoriously produce foie gras in high volumes and consume around 70% of the entire foie gras production world-wide.[3] There are around 200 animal circuses operating in France and even bullfighting still continues in the arenas of Nîmes and Arles.[4] And, of course, world-famous French cuisine is notoriously unaccommodating of vegetarians.

But that is only part of the story. While the French exhibit an indifference also seen in other European countries, it is also the case that French thinkers have led the way, positively as well as negatively, in the field of animal ethics.

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[1] *Committee of Inquiry into Hunting*, The National Archives, http://www.huntinginquiry.gov.uk/mainsections/huntingframe.htm (last visited May 15, 2011).

[2] *See Animal Testing in Europe*, About Animal Testing, http://www.aboutanimaltesting.co.uk/animal-testing-europe.html;*see also France Tries to Overturn EU Testing Ban,* Buzzle.com (Aug. 27, 2003), http://www.buzzle.com/editorials/8-26-2003-44645.asp.

[3] *See Foie Gras*, Wikipedia, http://en.wikipedia.org/wiki/Foie_gras (last visited May 15, 2011). See also Jean-Claude Nouët, "The production of foie gras" in Andrew Linzey, ed., *The Global Guide to Animal Protection*, University of Illinois Press, forthcoming.

[4] *See The New Stars of the Circus,* France Diplomatic, http://www.diplomatie.gouv.fr/en/article_imprim.php3?id_article=7363; *Bull Fighting*, Wikipedia, http://en.wikipedia.org/wiki/Bullfighting#French (last visited May 15, 2011).

II

Consider two of the giants of French philosophy and literature: René Descartes and Victor Hugo. Through the prism of these two great thinkers, we are able to grasp clearly – perhaps more clearly than through any other –what it means to be ethically enlightened and unenlightened about animals.

Descartes notoriously held a low view of animals. In a letter to the Marquess of Newcastle (William Cavendish), Descartes summarises his position thus: "I cannot share the opinion of Montaigne and others [,] who attribute understanding or thought to animals."[5] Again in another letter – this time to the Cambridge theologian Henry More: "there is no prejudice to which we are all more accustomed from our earliest years than the belief that dumb animals think."[6] How does Descartes reach this conclusion? It follows ineluctably from his understanding of Catholic doctrine. Human beings have souls and animals do not – or, to be wholly accurate, animals do not have *rational* souls like humans. From this *a priori* position, he is able to dismiss evidence of "thinking" behaviour among animals:

> It is certain that in the bodies of animals, as in ours, there are bones, nerves, muscles, animal spirits, and other organs so disposed that they can by themselves, without any thought, give rise to all animals the motions we observe. This is very clear in convulsive movements when the machine of the body moves despite the soul, and sometimes more violently and in a more varied manner than when it is governed by the will.[7]

Moreover: "it seems reasonable, since art copies nature, and men can make various automata which move without thought, that nature should produce its own automata, much more splendid than artificial ones. *These natural automata are the animals*."[8] And how can we know that animals are "automata"? One reason especially, says Descartes: animals cannot speak. "Such speech," he maintains, "is the only certain sign of thought hidden in a body." Again: "All men use it, however stupid or insane they may be, and though they may lack tongue and organs of voice...no animals do."[9]

That does not mean, however, that Descartes denies that animals have life or sensation: "I do not deny life to animals, since I regard it as consisting simply

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[5] René Descartes, letter to Marquess of Newcastle, 23 November, 1649 in DESCARTES: PHILOSOPHICAL LETTERS, (Anthony Kenny trans. & ed., Oxford: the Clarendon Press, 1970); extract in ANIMALS AND CHRISTIANITY: A BOOK OF READINGS at 48 (Andrew Linzey and Tom Regan eds., London: SPCK and New York: Crossroad, 1989), and Eugene, Oregon: Wipf and Stock, 2007) [hereafter Linzey and Regan, *Animals and Christianity*].

[6] *Id*. at 50.

[7] *Id*. at 51.

[8] *Id*. (emphases added).

[9] *Id*. at 52.

in the heat of the heart; and I do not deny sensation, in so far as it depends upon a bodily organ." And he adds in one significant line of ethical extrapolation: "Thus my opinion is not so much cruel to animals as indulgent to men – at least to those who are not given to the superstitions of Pythagoras – since it absolves them from the suspicion of crime when they eat or kill animals."[10] Thus, Descartes' thought absolves individuals of any wrongdoing and justifies their apparent indifference.

Much debate has raged over whether Descartes meant to deny all consciousness and, therefore, all capacity for sentiency to animals. Some have variously held that Descartes left these questions open, while others have followed him to the letter and regarded animals as wholly "automata."[11] Whichever is the better interpretation of his words, we should be clear that the legacy of Descartes has been wholly negative in relation to animals. The movement that followed him – Cartesianism – effectively legitimised the abuse of animals. As one commentator put it, the Port Royalists "kicked about their dogs and dissected their cats without mercy, laughing at any compassion for them, and calling their screams the noise of breaking machinery."[12] Even if the observation is exaggerated, it indicates that the link between *thinking* that animals are automata – and *treating them* as automata – became culturally established within a few generations. Whatever the necessary intellectual qualifications about what Descartes may or may not have actually meant, the damage was done; the myth of animals as "dumb brutes incapable of feeling" had entered the popular imagination.[13]

Indeed, the result of Cartesianism can be seen all around us: we hunt, ride, shoot, fish, eat, wear, exhibit, cage, factory farm, and experiment upon millions of

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[10] *Id*.

[11] *See* John Cottingham, "*A Brute to the Brutes?": Descartes' Treatment of Animals*, 53 Philosophy 551-59, (Oct. 1978); *but see* Tom Regan, The Case for Animal Rights 3-33 (London: Routledge and Kegan Paul, 1983).

There has also been discussion as to whether Descartes himself vivisected animals. There is prima facie evidence that he did. In a letter to Mersenne (November or December, 1632), Descartes says he is "dissecting the heads of various animals." In another letter to Mersenne (20 February, 1639), Descartes writes, "I have spent much time on dissection during the last 11 years ..." He claims he has dissected "various animals." But it is not clear if these were living or dead animals. But in a letter to Plempius (15 February 1638), Descartes says he "opened the chest of a live rabbit," which seems to settle the matter for all time, since he then goes into great detail of what he did with the rabbit's heart. *The Philosophical Writing of Descartes,* Volume III, translated by John Cottingham *et al,* (Cambridge: Cambridge University Press, 1991), Volume III, *The Correspondence*. Letters are usually organized and quoted in terms of the person to whom they were sent and the year. I am grateful to Professor Priscilla N. Cohn for these references and for her insight into Descartes.

[12] J. P. Mahaffy, Descartes 118 (London, 1901) cited and discussed in; A. Richard Kingston, *Theodicy and Animal Welfare*, Theology, Vol. LXX, No. 569 at 482-88 (November 1967). Kingston's article is also reproduced in Linzey and Regan, *Animals and Christianity*, *supra* note 5 at 71–78.

[13] *See* Gometius Pereira, *Antoniana Margarita, opus nempe physicis, medicis, ac theologis non minus utile, quam necessarium* (1554). One hesitates to say the myth was "born" because others, in particular Gomez-Pereira, (born in 1500 and died circa 1558), developed very similar ideas in his major work. Interestingly enough, Descartes denied that he had ever read the *Antoniana Margarita*. I am grateful to Professor Priscilla N. Cohn for this reference.

animals every year. We exploit animals without hardly giving them a thought or regarding their pains as morally significant. "Suspicion of crime" attaches to none of these activities. Of course, Cartesianism is not responsible for all this, since instrumentalist attitudes to animals predate Descartes, but it has provided a key intellectual justification for not regarding animals as beings that suffer pain or, if they do, believing that their pains aren't really analogous to human beings.

III

In one sense, Cartesianism is a strange development of Christian, specifically Catholic, thought, one that cannot easily be regarded as "orthodox" or biblical. As Karl Barth noted, there is no biblical basis for denying soul or spirit to animals.[14] Genesis 1.30 makes clear that all living beings have God's 'breath of life' (*nephesh*) within them. Psalm 36.6b declares forthrightly that "man and beast thou savest, O Lord." And then there is the humbling speculation of Ecclesiastes 3.9-21 that "the fate of the sons of men, and the fate of beasts is the same; as one dies, so does the other":

> They all have the same breath, and man has no advantage over the beasts; for all is vanity. All go to one place; all are from the dust, and all turn to dust again. Who knows whether the spirit of man goes upward and the spirit of the beast goes down to the earth?

More typically, however, scripture speaks of how what is created will be redeemed. In Isaiah 11.6-8, the advent of the Messiah brings universal peace where even the wolf and the lamb lie down together. In Romans 8.18-23, St Paul compares creation to a woman in childbirth, so that the sufferings of the present time are not worth comparing to the "glorious liberty" that awaits all God's creatures. And in Ephesians 1.9-10 and Colossians 1.15-20, God's purpose in Christ is to unite "all things" in heaven and in heaven.[15] Moreover, there is no suggestion in the Old and New Testaments that animals are incapable of feeling.

But the ambiguity of biblical practice needs to be acknowledged. Even as writers hoped for a better world and saw violence as a sign of how the creation had departed from the design of the Creator, it has to be acknowledged that they continued to use, hunt, eat, and wear animals.[16] The "instrumentalist" conception of animals as simply here for our use has been the dominant Christian view of

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[14] Karl Barth, **Church Dogmatics III.2 The Doctrine of Creation Part 2 "The Creature"** at 361 (ed. by G. W. Bromiley and T. F. Torrance, trans by H. Knight, G. W. Bromiley, J. K. S. Reid and R. F. Fuller) (Edinburgh: T & T Clark, 1960).

[15] *See* "*The Question of Animal Redemption*" (with representative selections from partisans on both sides of the debate, including: St Augustine, Bishop Joseph Butler, St Irenaeus, St John of the Cross, St Athanasius, John Calvin, John Wesley, Keith Ward, Paul Tillich and C. S. Lewis) in Linzey and Regan, *Animals and Christianity*, *supra* note 5 at 81-109.

[16] *See* Andrew Linzey & Dan Cohn-Sherbok, After Noah: Animals and the Liberation of Theology 1-16 (London: Mowbray, now Continuum, 1997) (providing an account of the prevalence of the "instrumentalist" tradition within both Judaism and Christianity).

animals. That view, of course, predates Descartes and Cartesianism. It is found in Aristotle, who maintained that since "nature makes nothing without some end in view, nothing to no purpose, it must be that nature has made them [animals and plants] for the sake of man."[17] That perspective influenced St. Thomas Aquinas, who, because of his similar emphasis on rationality, conceived of animals as non-rational and, therefore, outside the boundaries of moral concern.[18] Descartes, then, builds on an older tradition, but gives the negative logic an extra twist: starting from the premise that animals have no rational soul (shown the fact that they have no language), he goes further and surmises, or at least implies, that animals have insufficient consciousness to have "sensation" in any way analogous to human subjects. Thus the circle is tightly drawn: utterly non-rational, animals are automata. Even if Descartes left some doubt about how much animals can feel, his followers filled in the blanks and left no doubt.

Cartesianism has left its mark. It is very doubtful whether the negative statements (so common to Catholic thought up until the latter part of the twentieth century) would have been possible without the influence of the Aristotlelian-Thomist axis, buttressed by Cartesianism. Although Descartes was on the Index for many years (though not for his views on animals), Cartesianism lent a helping hand to the emerging science of experimental anatomy. Consider, for example, this statement from the famous and highly honoured French scientist, Claude Bernard (1813-1878):

> A physiologist...is a man of science...he no longer hears the cry of animals, he no longer sees the blood that flows, he sees only his idea and perceives only organisms concealing problems which he intends to solve. Similarly, no surgeon is stopped by the most moving cries and sobs, because he sees only his ideas and the purpose of his operation.[19]

Although animal suffering is recognised, it is to be ignored and shut out. This moral avoidance would have been unlikely without the popular Cartesian view that animals did not in fact suffer or that their suffering was not comparable with our own. Consider, also, the notorious view of the Jesuit Joseph Rickaby writing just after the beginning of the twentieth century:

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[17] Aristotle, The Politics I, iv (T. J. Saunders ed., T. A Sinclair trans. P. 79, Harmondsworth: Penguin Books, 1985).

[18] *See* St. Thomas Aquinas, *The Lawful Treatment of Animals, in* **Summa Theologica** (English Dominican Fathers trans., Benzinger Bros., 1918), *reprinted in* Linzey and Regan, *Animals and Christianity*, *supra* note 5 at 124-27.St Thomas Aquinas, Question 64, Article 1 on "whether it is lawful to kill any living thing" and Question 65, article 3 on "whether irrational creatures ought to be loved out of charity." As to the first question, Aquinas concludes that is it is morally licit to kill animals because they are made for us, and as regards the second, Aquinas maintains that we have no duties to love animals because we cannot have "rational friendship" with them.

[19] Claude Bernard, An Introduction to the Study of Experimental Medicine at 103 (Henry C. Greene trans., (New York, Dover Publications, Inc., 1957).). I am grateful to Professor Priscilla Cohn for this reference.

> Brute beasts, not having understanding and therefore not being persons, cannot have any rights. The conclusion is clear.… They are of the number of *things*, which are another's: they are chattels or cattle. … We have no duties of charity, nor duties of any kind, to the lower animals, as neither to stocks and stones.[20]

It is not difficult to see the combined effect of Thomism and Cartesianism in the way in which animals are progressively defined out of the moral picture: they have no rights, they are not persons, they are only things, and we no have duties to them. And if this strikes one as extreme, over sixty years later, similar elements of thought can be found in the more mainstream *Dictionary of Moral Theology*: "Zoophilists [animal lovers] often lose sight of the end for which animals, irrational creatures, were created by God, viz., the service and use of man. In fact, Catholic moral doctrine teaches that animals have no rights on the part of man."[21]

Of course, Christianity is always revising itself, and the *Catholic Catechism* of 1994 balances the wholly instrumentalist line of previous generations by stressing that "men owe animals kindness." and that "[i]t is contrary to human dignity to cause animals to suffer or die *needlessly*." These are, surely, welcome indications of a modified Thomism (one that both St. Thomas and Descartes would surely not have approved); but, the instrumentalist attitude still pervades its treatment of animals, since it is "legitimate" to use animals for food, clothes, domestication and in experimentation.[22]

Even though Catholicism may have moved on (at least partly), elements of Cartesianism still influence even secular philosophy. Mind-body dualism has still many adherents, and for those who adopt this view, animals are invariably a problematic case. Perhaps the clearest expression is found in Peter Carruthers work, *The Animals' Issue*, which denies that animals have self-consciousness and are therefore incapable of pain.[23] To be fair, this is a minority, even eccentric, view within contemporary philosophy, but it will not be unfamiliar to those acquainted with Descartes.

Even more significant, Cartesianism still lingers on in popular notions about animals. There is still the general suspicion that animals don't really feel "like us" or, even if they do feel some pain, it isn't as morally significant as "our" suffering. Although doubts about the suffering of mammals at least have no scientific basis,

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[20] Joseph Rickaby, 2 Moral Philosophy 248 (London: Longman, 1901), *available at* http://www.fullbooks.com/Moral-Philosophy.html. This was, in its day, a popular manual of moral theology.

[21] Fancesco Roberti, Dictionary of Moral Theology 73 (Pietro Palazzini ed., Henry J. Yannone, trans.) (London: Burns and Oates, 1962).

[22] *Catechism of the Catholic Church* 516-17, ¶ 2415-18 (London: Geoffrey Chapman, 1994) (emphasis added). The word "needlessly" of course begs many questions; *see also* Andrew Linzey, Animal Gospel: Christian Faith as if Animals Mattered 56-63 (London: Hodder and Stoughton, and Louisville, Kentucky: Westminster John Knox Press, 1999).

[23] *See* Peter Carruthers, The Animals' Issue: Moral Theory in Practice (Cambridge: Cambridge University Press, 1992). *But see* Andrew Linzey, Why Animal Suffering Matters (New York: Oxford University Press, 2009).

given that there is ample evidence of such pain in scientific peer-reviewed journals,[24] that does not, by itself, prevent popular prejudice. It is still reflected in our very language about animals: "brutes", "beasts", "dumb creatures", even "beastly" or "bestial" behaviour. Since Descartes himself specifically made the link between his view of animals and being "absolved from the suspicion of crime," one cannot be surprised that his followers have utilised his defence to justify their unethical treatment of animals.

IV

But Descartes and Cartesianism is only one pole of the French legacy of thought about animals. Although born and bred a Catholic, Victor Hugo rebelled against organised religion famously writing his anti-clerical works, such as *The Pope* (1878), and *Religions and Religion* (1880), which lampooned the cruelty of religious fanaticism, and declaring himself a "free-thinker."[25] But his sense of God, however, never entirely left him. "Religions pass away, but God remains", Hugo declared. Christianity would eventually disappear, he predicted, but people would still believe in "God, Soul, and the Power."[26] For many, Hugo was the standard-bearer of a more humane kind of faith, shorn of religious dogmatism and the dead hand of institutional religion.

Freed from the influence of traditional scholasticism, it is perhaps not surprising, then, that Hugo should offer a more sympathetic view of animals. His work, *The Alps and Pyrenees*, a collection of letters to his wife, is a series of reflections stemming from his travels among the mountains of southern France. Distressed by the cruel treatment of the mules that pulled his carriage, he finds himself unable to sleep, and dwells upon their fate:

> I asked myself: "What may be taking place, what is taking place in these poor mules, which, in the somnambulism in which they live, vaguely enlightened by the flickering gleams of instinct, deafened by a hundred bells around their ears, almost blinded by their *guardaojos*, imprisoned by their harness, overpowered by the jangling of their chains, the rumble of wheels, and the echo of the road ceaselessly pursuing them, feeling the wild attacks upon them of these three Satans [drivers], unseen by them but heard in the darkness and the tumult? What signifies for them this dream, this vision, this reality? Is it a punishment? But they have committed no crime ..."[27]

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[24] *See* David DeGrazia, Taking Animals Seriously: Mental Life and Moral Status (Cambridge: Cambridge University Press, 1996) (summarizes much relevant scientific evidence); *See also* Andrew Linzey, Why Animal Suffering Matters (2009).

[25] *See* George William Foote, **Flowers of Freethought, Vol. 1,** p. **163-66 (London, R. Forder, 1893)**

[26] *See* Graham Robb, Victor Hugo 525ff (London: (Picador, 1997).

[27] Victor Hugo's Letters to his Wife and Others (The Alps and Pyrenees) 248 ((Nathan Haskell Dole trans., (Boston: Estes and Lauriat, 1895). I am grateful to John Newmark for this reference.

Hugo of course was not the first to be moved by the sight of animal suffering, but few have allowed their experience to provoke deeper questions about the meaning of life for other non-human sufferers, and specifically how they - and Nature herself - might judge us. Such thoughts culminate in some remarkable lines of speculation:

> Human philosophy has cared little for man outside of man, and has only superficially and almost disdainfully inquired into the relations of man with things and with the animal which in his eyes is only a thing. But are there not here mighty depths for the thinker? . . . I for my part think that pity is a law as much as justice, that goodness is a duty as much as probity. Whatever is weak has a claim on the goodness and the pity of whatever is strong. The animal is weak because it lacks intelligence. Let us therefore be kind and pitiful towards it . . . In man's relations with animals, flowers, with the objects of creation, there is a great system of morality as yet scarcely perceived, but destined to be more and more observed and to become the corollary of human morals.

And he concludes with his famous line: "Doubtless it was the first duty … it was necessary to civilise man on the side of man. The task is already advanced and makes advances every day. But man also needs to be civilised on the side of Nature. Here everything is to be done."[28]

Hugo's words have a remarkably contemporary ring to them at a time when we are increasingly concerned with human exploitation of Nature, an exploitation that has been so extensive that it brings the welfare, if not the survival, of future generations into question. What Hugo regarded as daring (and was truly prophetic in its time), namely the need for "civilised" attitudes to the world beyond humanity is at least now on the moral agenda, even if practical politics and the necessary lifestyle changes lag behind.

That does not mean that all aspects of Hugo's reflections can be unequivocally adopted today. There is still a strain of "instrumentalism" in his thought. He interprets the Golden Rule exemplified in the life of Jesus as meaning that the "doing unto others" requires mutual service in creation. On one hand, the function of humanity is to "love", and on the other "all objects serve man according to the laws peculiar to them: the sun gives its light, the fire its heat, the animal its instinct, the flower its perfume." Again: "It is their way of loving man. They follow their law, and they do not shirk it." But, in return, "Man ought to obey his." He ought to render to nature "his light, his heat, his instinct, his perfume – love."[29]

In Hugo's vision, then, there should be mutual service in creation; the use of animals, even their killing, is not proscribed when essential, but humanity must

[28] *Id*. at 249-51.
[29] *Id*. at 251.

refrain from unkindness and there must be no infliction of "useless suffering."[30] It must be questioned what the "service" of humans by other creatures means when it is in fact *compelled* service, since other creatures have no capacity for free moral choice. Are there not still elements of Aristotelian "instrumentalism" in the idea that all creatures – humans, animals and vegetables – must still serve some "function"? Hugo, it seems, could not entirely dispense with the functional teleology which so dominated his time, as it does ours. Even so, the enduring aspect of Hugo's thought consists in its new reading of human superiority. Contra Descartes, human power ought to be used for the benefit of the weak. "Whatever is weak has a claim on the goodness and pity of whatever is strong". It is that perception that has helped galvanize another, altogether different, Christian vision, namely human service to the created order.

On the issue of suffering, Hugo was quite adamant. When invited, some forty years later, to become the first President of the Société française contre la vivisection, replied: "My name is nothing. It is in the name of the whole human race that you make your appeal. Your society is one that will reflect honour on the nineteenth century. Vivisection is a crime. The human race will repudiate these barbarities."[31] Of course Hugo was not alone in articulating positive thoughts about animals. Other thinkers, both religious and anti-religious, have contributed to French humanitarianism. Michel de Montaigne and Voltaire are two obvious examples.[32] But to Hugo goes the credit of anticipating "a great system of morality" that is inclusive of suffering animals. It is only when one appreciates the force of Cartesianism, still operative in Hugo's own day, that one can see how radical it was to dispense with the notion of animals as "things" and insist on limits to human exploitation. That many now wish to go further than Hugo did himself should not detract from his own remarkable contribution. His thought became the building block of a new kind of enlightenment towards animals. The "humanitarian movement" of the nineteenth century mushroomed a range of philanthropic organisations, including the British Society for the Prevention of Cruelty to Animals in 1824, and the French Societé Protectrice des Animaux in 1845 that worked collaboratively for progressive change.[33]

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[30] *Id*. at 250.

[31] Hugo, *The Zoophilist* [a British anti-vivisectionist journal], December 1884, p. 152, cited and discussed in John Vyvyan, **In Pity and in Anger: A Study** of the Use of Animals in Science 143 (London: Michael Joseph, 1969).

[32] *See* Michel de Montaigne, *Apology for Raymond Sebound*, (c.1592) *reprinted in* Animal Rights: A Historical Anthology 64, 105-12 (Andrew Linzey & Paul B. Clarke eds.) (New York: Columbia University Press, 2004); *see* Vyvyan, In Pity and in Anger *Supra* note 31 at 24, 28, and 143.

[33] *See* Sabrina Tonutti, *Cruelty, Children and Animals: Historically not two but one cause* The Link Between Animal Abuse and Human Violence Andrew Linzey ed., (Brighton: Sussex Academic Press, 2009).

V

Descartes and Hugo are theologically significant because they epitomise two possibilities within the Christian tradition. The first excludes animals from moral considerability, the second offers a vision of their inclusion. One sees animals as soulless automata; the other as fellow creatures whose suffering merits our compassion. One views human power over animals as absolute; the other prescribes moral limits. These rival perceptions have jostled within the Christian tradition (as they have within wider society) for centuries. Although they were magnified by the emergence of scholasticism, which, for the most part, amplified and justified the first set of perceptions (on which Descartes himself built), they in turn reach even further back to the ambiguity of the biblical material, as we have noted.

The important question is: which view is most likely to prevail in the Christian centuries to come? One should not underestimate the vitality or the endurance of the instrumentalist view of animals. It has lasted at least since Aristotle and is not anywhere near its last gasp. The reason is simple, at least sociologically: our attitudes towards animals are in large measure determined by our habits, and only fractionally (if at all) by our mental processes. I am reminded of that famous quip by Bertrand Russell that few English people think, most of them would rather die than think, and most of them actually do. Since humans so obviously benefit from using animals, entertaining contrary thoughts threatens our existing lifestyle, not to mention our eating preferences. It is perhaps not surprising that cultures (including those in which the Bible was written) so vastly indebted to exploiting animals should find appealing the notion that the God had actually ordained it that way.

And yet, even habits are mutable. What should perhaps strike us is how far we have already moved towards Hugo's vision of an inclusive ethic. Although Christianity often appears (especially to outsiders) as if it were an unchanging monolith, the truth is that it is constantly in a state of change.[34] Tradition has been defined as the "seedbed of creativity" and, as a living tradition, Christianity is a movement of ideas, people, and institutions that is always permeable (and, as Christians believe, open to the promptings of the Holy Spirit). For those who doubt this, one only has to consider the increasing prominence given to "the environment" or ecological concerns in church statements during the last 50 years. Given that Vatican II did not even regard the care of creation as a topic worthy of consideration, such contemporary sensitivity is nothing less than remarkable.[35]

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[34] *See* Keith Ward, Re-Thinking Christianity (Oxford: Oneworld, 2007),
(arguing that Christian belief has changed dramatically since its earliest days); *but see* Andrew Linzey, *Incurable Case of Infantalism,* Times Higher Educational Supplement No 1, 796 at 25 (June 1, 2007), also available at:
http://www.timeshighereducation.co.uk/story.asp?storyCode=209205&sectioncode=40.

[35] *See* Austin Flannery, Vatican Council II: The Concilliar and Post-Concilliar Documents (1975). Anyone who examines the documents will be astonished at the absence of environmental concern at Vatican II.

And yet the question remains: Can the Christian tradition embrace not just concern for the environment, but specifically the cause of animals? I think that remains an open question. Although many churchpeople were prominent in the establishment of animal protection societies in the nineteenth century, it is still the case that many churches are unsympathetic to animals and, indeed, sometimes hostile.[36]

What seems clear is that if there is to be change, then we need the intellectual resources to enable us to interpret the Christian tradition afresh. During the last 40 years, I have devoted myself to this task clocking up more than 10 book publications on Christianity and animals – all with the intention of putting animals on the agenda of my fellow Christians.[37] And if there is one theme that unites most, if not all, of my work, it concerns the nature of human "power" over creation and what it means theologically.

That humans have God-given power over animals seems evident from Genesis 1.28, where humans are given "dominion" over animals. Thus much of the Christian tradition has supposed that – in the words of Thrasymacus –that "might is right" in relation to animals. We have power and that is its own justification. But this view has undergone challenges in two directions. The first is that most biblical scholars now reject the idea that dominion means despotism, rather, they claim dominion means that we should have a God-like care for creation and, as God's vice-regents, care for creation as God would have us do. And in case this appears like liberal revisionism of an ancient text, there is internal evidence in the text itself. In Genesis 1. 26-9 humans are made in God's image and given dominion, and in the subsequent verse (29-30) given a vegetarian diet. Herb-eating dominion is hardly a license for tyranny.

The second challenge comes from rethinking what power must mean from a Christological perspective. Here we reach the decisive consideration: our power or lordship over animals needs to be related to that exercise of lordship seen in the life of Jesus Christ. Jesus provides us with what I have called a "paradigm of inclusive moral generosity" that privileges the weak, the vulnerable, the poor, the marginalised, and the outcast.[38] But, if costly generosity really is the God-given

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[36] One of many contemporary examples is the opposition from bishops of the Church of England to the abolition of hunting with hounds: over 12 bishops spoke or voted against the ban. *See* Andrew Linzey, *Christian Theology and the Ethics of Hunting with Dogs,* (London: Christian Socialist Movement (2003) (pamphlet); Andrew Linzey. *An Open Letter to Bishops on Hunting* (20 December, 2002) reproduced as an appendix, *in* Creatures of the Same God: Explorations in Animal Theology 179-84 (Winchester: Winchester University Press, 2007).

[37] *See* Andrew Linzey, Animal Rights: A Christian Assessment (1976); Andrew Linzey, Christianity and the Rights of Animals (1987); Andrew Linzey, Animals and Christianity: A Book of Readings (1989); Andrew Linzey, Animal Theology (1994); Andrew Linzey, After Noah: Animals and the Liberation of Theology (1997); Andrew Linzey, Animal Rites: Liturgies of Animal Care (1999); Andrew Linzey, Animal Gospel (1999); Andrew Linzey, Animal Rights: A Historical Anthology (2004); *Creatures of the Same God* (2007); and Andrew Linzey, Why Animal Suffering Matters (2009).

[38] *See* Andrew Linzey, Animal Theology (London: SCM Press, and Chicago: University of Illinois Press, 1994).

paradigm, then it ought to also be the paradigm for the exercise of human dominion over the animal world. The doctrine of the incarnation involves the sacrifice of the "higher" for the "lower", not the reverse. And if that is the true model of divine generosity, it is difficult to see how humans can otherwise interpret their exercise of power over other sentient creatures. As I have written elsewhere:

> When we speak of human superiority, we speak of such a thing properly only and in so far as we speak not only of Christlike lordship but also of Christlike service. There can be no lordship without service and no service without lordship. Our special value in creation consists in being of special value to others.[39]

Thus, it seems clear to me that we are the species commissioned by God to serve creation – so much so that we must give up thinking of ourselves as the "master species" but rather as the "servant species." Although I believe I am the first to utilise this concept, Hugo clearly anticipated it when he spoke of the claim of the weak upon the strong. Thus, although the view that animals are "here for our use" remains the dominant voice within Christendom, there is a legitimate and theologically compelling alternative viewpoint: our power means service.

VI

At first sight, it may appear that such lofty notions, as the claim of the weak upon the strong, are untranslatable into the areas of law and practical politics. But, in fact, that particular notion was one of the guiding inspirations behind the humanitarian movement of nineteenth century that expressly included both vulnerable human as well as animal subjects within its remit. As I have written elsewhere:

> It is worth noting that the concern for the alleviation of animal suffering that emerged in the nineteenth century was part of a broader "humanitarian movement" equally concerned for the protection of children from abuse and cruelty, the abolition of slavery, the establishing of minimum working conditions, and the emancipation of women. As Henry Salt, founder of the Humanitarian League (1894–1920), emphasized: 'Humanitarianism must show that it is *not* "bestarian," and must aim at the redress of *all* needless suffering, human and animal alike. . . .'[40] Many of the key movers for animal protection – William Wilberforce, Lord Shaftesbury, and Fowell Buxton, to take only three examples – were prominent

[39] *Id*. at 33.

[40] George Hendrik, Henry Salt: Humanitarian Reformer and Man of Letters 193 (1977) (quoting Henry Salt *A Lover of Animals*, which was originally published in *The Vegetarian Review*, February 1895.

> in these campaigns.[41] From this starting point, and from that day on, we have continued to welcome a range of legislative measures that grant specific protection to those who are easily abused and exploited. The notion then that there is a legitimate social or public interest in limiting animal suffering has a long provenance. There is a benevolent motivation behind socially progressive legislation that some, perhaps even many, would hold to be the proper function of law, namely to defend the weak and defenceless.[42]

Although it is fashionable to disparage notions of "benevolence" or "philanthropy" which characterized nineteenth-century attempts at reform, it is important to grasp that, even as we criticize them, they had a powerful effect in motivating reform in their own day. Advocate of animal rights though I am,[43] it is untrue that only the harder-edge language of rights has brought about legislative change for animals. The first reforming bills from Lord Erskine's 1800 bill to prevent bull-baiting through to Martin's Anti-Cruelty Act in 1822 in the UK were consistently advanced on the basis that the strong had a moral duty to the weak. Indeed, up until the present day, the requirement of beneficence garners wide appeal. The Animal Welfare Act of 2006 in the UK (passed with hardly any debate) establishes a far-reaching legally-enforceable "duty of care" on all who have domestic animals.[44]

That Hugo's notion of the special claim of the weak should have found greater resonance within Britain testifies to the cultural transferability of ideas. But it can only be a question of time before Hugo's vision – and its implications for moral practice – is more fully celebrated in the land of his birth.

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[41] Hilda Kean, Animal Rights: Political and Social Change in Britain Since 1800 56-57 (London: Reaktion Books, 1998) (describes the roles of these individuals in the animal protection movement).
[42] Linzey, **Why Animal Suffering Matters** *Supra* note 23.
[43] Andrew Linzey, Christianity and the Rights of Animals (London: SPCK, and New York: Crossroad, 1987) (defending a theological basis for animal rights).
[44] *See* Animal Welfare Act, 2006, c. 45 (Eng.), *available at* http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060045_en.pdf.

A shmuz about Schamalz*
A Case Study: Jewish Law and Foie Gras

Randall Schapiro†

* Yiddish words translated as 'A Discussion about Duck Fat'

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I. Introduction

Many efforts, on both political and economic fronts, are made to prevent the public from having proper access to food production methods and knowledge about the food they eat. There have been efforts to make it illegal to take a photo of any industrial food operation. It has been reported that the way we eat has changed more in the last 50 years than in the past ten thousand. One need only peruse the modern supermarket aisles and reflect on the fact that, on average, its shelves hold some 47,000 products.[1]

The cruelties visited upon animals in modern agriculture are indisputable and truly staggering in their proportions. Approximately ten billion animals, excluding fish, are killed annually in the United States for food. In 2004, California enacted a ban on the sale and production of foie gras which becomes effective in 2012.[2] In 2006, the city of Chicago also enacted a ban on the sale of foie gras, but without the extended phase-in period that California has put into place.[3] These laws are particularly powerful in that they ban sale, and not just production of foie gras. Other private establishments have also taken note of the public outcry for animal welfare and have taken action themselves. Whole Foods, Disney World, and Wolfgang Puck restaurants are a few of the places that have refused to sell foie gras over the past decade.

Indeed, animals have always been an important part of human existence. From the dawn of history until only a few generations ago, virtually every person from the poorest to the wealthiest lived in the intimate company of domestic animals. Rural life on the farm was the only way of life. Judaism acknowledges ethical duties towards animals, yet animals throughout Judaism are permitted for many uses for the benefit of eating, and sacrifice, for example.

Judaism says however that the duties to animals are a consequence of the benefit we derive from them. Ethical duties don't arise in a vacuum; they generally stem from a combination of *empathy* and *reciprocity*. Reciprocity doesn't have to mean tit for tat; animals won't go on strike and refuse to help us if some people treat them inappropriately. In this context, reciprocity means that we acknowledge the benefit animals provide us and requite it with basic standards of humane treatment. The statutes in the Torah (the Jewish word for the Old Testament) laying out rules and principles for animal welfare, are designed to foster a refined treatment towards animals, but are authored with a purpose in mind. They are more intended to inculcate values and feeling within us as humans (or Jews) rather than to strict recognition of animal rights. One of the purposes behind animal welfare in the Jewish view is to cultivate refined humane conduct towards and between people.[4]

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[1] In addition, our food bares little resemblance to its natural substance: almost everything we eat has used enormous amounts of fossil fuels to get to our tables, and corn derivatives (corn starch, corn oil, corn syrup) drive the agribusiness economy. See Michael Pollan, *The Omnivore's Dillema: The Natural History of Four Meals*, Penguin Press, April 11, 2006.

[2] *Cal. Health & Safety Code § 25981*-82 (2006).

[3] Chi. Mun. Code§ 7-39-001 (2006).

[4] Some research bears out and confirms a connection between people who torture animals as youngsters and those who are violent as adults. Psychologists utilize the *Macdonald Triad* assessment as

II. Jewish Law and Animal Rights

A. Appreciation of the Animal World

It is often said that with great power comes great responsibility.[5] Thus when at the beginning of the Jewish Torah God gives man "dominion over the fish of the sea, and the fowl of the air, and over every living thing that creeps upon the earth"[6], He qualified and limited this dominion in the next verse by only allowing man to partake of "the herbs bearing seed on the whole face of the earth, and every tree bearing fruit giving seed." Thus the original plan of God was for Man to dominate the animals, but not to eat them. Only after the great flood in chapter 6 of *Genesis,* after most of mankind was destroyed for their sins, was man permitted to consume animals.[7] Commentators say that this was merely a concession to man to remind him of his superiority over animals and capitulate to his weaker post-diluvian disposition.[8] Indeed, according to tradition, a crude unrefined person is not allowed to eat meat despite the general allowance because of his inability to understand the benefits of this dispensation.[9] Man must therefore understand that his power over animals was a concession to his weaknesses and must be mindful to care for the animal world properly.

Indeed, a basic tenet within Judaism is to appreciate the world that God has created and provided for mankind and express this gratitude in a variety ways. One fundamental way is to recognize that animals are the miraculous creation of an all-powerful God. Another way to appreciate animals is to focus on the utility that they provide for mankind in their ability to better our world by providing cures for disease, instructing us on proper methods of behavior, and finally having a transcendental impact on the world as a whole.

1. Appreciation as God's Creation

Jews are bound to appreciate God's creation and all the various animals within it as Psalms 104:24 says, "How great are Your works, O' God! In wisdom

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an indicator for sociopathic behavior See Lea, Suzanne Goodney, *Delinquency and Animal Cruelty: Myths and Realities about Social Pathology*, (2007).

[5] A similar sentiment is reflected in such words that "Laws protecting animals from mistreatment, abuse, and exploitation are not a moral luxury or sentimental afterthought to be shrugged off. They are a serious moral obligation…" See Matthew Scully, *Dominion*, *The Power of Man, the Suffering of Animals, and the Call to Mercy*, (2002), Pg. 43.

[6] 1 *Genesis* 26.

[7] *See* 9 *Genesis3*, "Every moving thing that lives shall be food for you…"

[8] *See Obadiah ben Jacob Sforno* (Venice, 1567) commentary on 6 *Genesis* 13.

[9] *Talmud Passover 49b*. The *Talmud* is the multi-volume rabbinic compendium of Jewish law dating to 200-500 CE; and the *Midrash* is the homiletic teachings of the Bible also dating thousands of years ago. In fact at least one source indicates that in the Messianic era mankind will revert to the Edenite ideal of vegetarianism. (Rabbi Avraham Yitzchak Kook, Chazon Ha'Tzimchiyot V'HaShalom 6:9,11).

You have made them all; the earth is full of Your creatures." Rabbi Moses ben Maimonides (Rambam) asks, "How does one come to love and fear God? When man contemplates His great wonders … and creations."[10] According to Rabbi Moses Cordovero:

> God Himself sustains all animals and a person should accustom himself to respect all creatures, since the perfection of the Creator, Who formed man with wisdom, is recognizable amongst them - likewise the wisdom of the creator is in all creatures. It is similar to a master craftsman, who shows his work to people, and by disparaging the handiwork they are disparaging the craftsman.[11]

Indeed Jews are even bound to recite special blessings upon seeing different beautiful and unusual creatures such as elephants and monkeys (and even unique species of birds) in order to give recognition and thanks to God who created such a wide variety of creatures in this world.[12]

2. Appreciation for Animal's Utility

a) Health Benefits

Not only is the extent of wonder and admiration of God's creation important but also the realization that all animals have a purpose is fundamental to understanding the Jewish view on animals. In commenting on the kosher and non-kosher species of animals fit for consumption, Rabbi Moses ben Nachmanides says that God created all creatures for the need of man.[13] As an example, Jewish tradition indicates that animals provide medical benefits such as the snail as a cure for scabs, the fly as an antidote for the hornet stings, the mosquito as an antidote for a snakebite, snakes as a cure for sores, and spiders for scorpion stings.[14] The concept that each and every animal has a purpose extends even to small insects, as the Talmud further explains, "God performs His operations through the agency of all of them, even through a snake, mosquito, or frog."[15]

b) Indications of Proper Behavior

According to Judaism, animals provide instruction to mankind (by their examples) in the area of proper behavior ranging from appropriate personal habits

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[10] *Yad Hachazakah*, Fundamental Laws of the Torah 2:1-2.
[11] *Tomer Devorah*, 1588, Chapter 2.
[12] Talmud Berachos 58b and Rosh Hashana 31a; Code of Jewish Law 225:10.
[13] *See* Ramban commentary to 17 *Leviticus* 11.
[14] Talmud Sabbath 77b; *Midrash Genesis Rabbah* 10:7.
[15] *See* Talmud Gittin 56b regarding Titus's death via a mosquito and King David escaping death with the assistance of a spider.

to acceptable social interactions. By observing how animals interact within their own ecosystems, habitats and family units, we can derive lessons for our own human societies. *Proverbs 6:6* says "Go to the ant, sluggard, see its ways and become wise" and *Job 35:11* "He teaches us from the animals of the land, and from the birds of the heavens He makes us wise." The Talmud indicates that we can even learn specific character traits for human society such as "modesty from the cat, the prohibition of theft from the ant, the prohibition of forbidden relationships from the dove, and the proper method of conjugal relations from the fowl."[16]

c) Impact on the Worldview

Besides stressing the importance of each individual animal or species of animal, Judaism believes that world ecosystems in general are crucial to the functioning and existence of the planet. The biological view that animals and plants lead lives that are interconnected by a complex web of food chains and symbiotic relationships is echoed in Jewish thought: "All parts of creation are tied together …[and]…united in a single purpose."[17] It is indeed argued that the current appreciation of the unity of the natural world is one of Judaism's legacies in its initiation of a monotheistic worldview:

> Where the ancients were content to create many minor deities, each of whom had a hand in explaining the origins of particular things, but might often be in conflict with one another, the legacy of the great monotheistic religions is the expectation that the Universe is at root a unity, that it is not governed by different legislation in different places, neither the residue of some clash of the Titans wrestling to impose their arbitrary wills upon the Nature of things, nor the compromise of some cosmic committee.[18]

Therefore, more than pushing for a sustainable planet through conservation techniques and promoting the idea that all creatures have a utility and usefulness to man's existence, Judaism proposes that animal welfare in general derives fundamentally from the concept that animals represent God's master plan for the world and that failure to treat all living beings with the proper respect may have disastrous effects across the planet.

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[16] *Eruvin 100b*.
[17] Rabbi Chaim Luzzato to *Daas Tevunos* 128; Rabbi Hirsch, *Collected Writing Vol. VII*, p. 258.
[18] John Barrow, *Theories of Everything* (New York: Oxford University Press 1991), pp. 8-15.

B. Biblical and Rabbinic Concepts of Animal Welfare

1. Positive and Negative Commandments

The basic structure of Jewish law encompasses a variety of positive and negative commandments believed to be mandated by God directly to the Jewish people. Indeed the structure of the Ten Commandments themselves are basically divided in this fashion whereby the first five are written in the positive construct and the last five in the negative construct.[19] The precepts in the Torah written in regards to animals are likewise written in both the positive and negative construct as well. The Torah generally positively obligates a Jew to emulate God's merciful ways.[20] Just as God's traits include slowness to anger, charitability, forgiving and caring, so too is man obligated to express these character traits to other beings including animals. Indeed many verses speak of the concept that God has "compassion upon all his works"[21] interpreted to extend to all animals. Proper care and compassion for one's own animals is described in *Proverbs 12:10* as "the righteous person knows the soul of his animal." We find that in the initial chapters of the Torah, Noah and his family were deeply involved in caring for animals on his Ark. God confided in them the great responsibility and work to repopulate a new world order after the deluge brought destruction to the world. Practicing kindness to animals was fundamentally important to the new world order: if mankind was to be able to make a new start it would have to be based on a higher moral platform. The Torah thus calls Noah "righteous"[22] because he was involved in feeding and caring for God's creatures.[23] Conversely, we find an anecdote in rabbinic literature whereby a premier Rabbi was held to account for his lack of compassion for a small calf that came to him and hid in his coat while being brought to the slaughter.[24] Further, when God chooses Jewish leaders for Israel he looks to the shepherds because of their ability to have compassion for animals. God in effect demonstrates to us that in order to care for the "flock of Israel" one must first be able to show he is able to care for the innocent animals in the fields.[25] We find that the greatest leaders of Jewish history including the Patriarchs, Moses, and King David were all involved in shepherding and tending to their flocks.[26]

Judaism asserts that animals have feelings and therefore deserve our mercy. Maimonides indeed indicates that the pain of animals is very great and that there is no difference between the pain of humans and the pain of other animals. [27] When God speaks of destroying the city of Nineveh, He asks why he should not have mercy

[19] Some however are explained as both positive and negative forms as noted infra.
[20] *Bava Metzia 32a*.
[21] 145 *Psalms 9*.
[22] 6 *Genesis 9*.
[23] *Midrash Tanchuma Noah 5*.
[24] *Talmud Bava Metzia 85a*.
[25] *See* 78 *Psalms 71*.
[26] See *Midrash Exodus Rabbah* 2:2 explaining 3 *Exodus* 1, 11 *Psalms* 5 and 78 *Psalms* 70.
[27] *Guide For the Perplexed 3:48*.

on the city for the sake of the animals therein,[28] and King Saul had compassion upon animals when commanded to destroy the nation of Amalek and all their belongings.[29] Indeed, although rabbinic dispensation[30] is given to utilize animals for food, clothing, and atonement through sacrifice, unwarranted killing/pain of animals is so severe that Judaism equates it with bloodshed.[31] A commandment of the Torah even mandates that the blood of various animals receive proper burial as the blood represents an animal's soul and therefore deserves proper respect.[32] Furthermore, a Jew must provide food and drink for his animals and is forbidden to eat himself before he has fed them.[33] In another positive sense the Torah obligates the Jew to assist in unloading a donkey's burden and helping an animal back to its feet if it has fallen.[34]

The negative construct commandments regarding animal cruelty are numerous as well. Maimonides indicates an explicit warning in the Torah regarding animal cruelty is found in God's castigation of the prophet Balaam for striking his donkey.[35] Also a Jew must not (normally) mutilate an animal[36] for such purposes as spading and neutering. Beyond the prohibition of physical abuse Judaism extends the laws even further. A Jew must refrain from muzzling an animal while it works a field in order to allow it to eat while working or preventing the distress it might feel from seeing food it cannot eat.[37] The Torah prohibits ploughing one's field with two animals of different strengths together.[38] Sometimes Jews are forbidden to practice certain customs of the nations under which they live. For example, Jews must not participate in hunting as the other nations are involved.[39] Even individual birds deserve a measure of compassion even when the dispensation for food exists. The Torah says, "If you happen across a bird's nest…Do not take the mother bird together with the children."[40] Furthermore, to conserve species and inculcate a limit on food production Jewish law states, "You shall not slaughter [an animal] and it's young on the same day."[41] Finally, a Jew must not cook an animal in its mother's milk[42] because the Torah views this as an extremely heartless practice to prepare an animal in the very source where it was born.

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[28] 4 *Jonah 11*.
[29] *See Talmud Yoma 22b*.
[30] *Sefer Hachinuch* (The book of Jewish Training; 13th century, published anonymously), chapter 186.
[31] See *Leviticus* 17:3-4 that if slaughter (of consecrated animals) is not performed according to the prescribed mandates of the Torah it is equal to the crime of homicidal bloodshed.
[32] *Rabbi Chayim ben Attar* commentary on 17 *Leviticus 13-14*.
[33] 11 *Deuteronomy 15*; *Talmud Blessings 40a*.
[34] 23 *Exodus 5* and 22 *Deuteronomy 4*. *See also Talmud Bava Metzia 35b*; *Shabbos 128b*.
[35] *Guide for the Perplexed 3:17*; 22 *Number 32*.
[36] 22 *Leviticus 24*.
[37] 25 *Deuteronomy 4*; *Talmud Bava Metzia 32b*.
[38] 22 *Deuteronomy* 10.
[39] *Avodah Zarah 18b*. Hunting in the Bible is mostly seen in a negative light as the evil Nimrod, Ishmael and Eisav were known to be hunters. (See 10 *Genesis*9, 21 *Genesis* 20, and 25 *Genesis* 27).
[40] 22 *Deuteronomy 6-7*. This prohibition is written first in the negative construct and then changes to the positive construct to actively send away the mother bird before taking the young.
[41] 22 *Leviticus 28*; *Midrash Devarim Rabbah 6:1*.
[42] 23 *Exodus 19*.

A Jew must also refrain from the general prohibition of committing wasteful practices. The Torah says, "When you shall besiege a city for a long time, in making war against it to take it, you shall not destroy (*bal tashchis*) its trees by forcing an ax against them."[43] This applies equally to wanton destruction and waste of animal, plant, and material items. Although described in the Torah as merely applying to trees during the time of a siege of a city, the prohibition of *bal tashchis*, applies to a much broader area of life extending to any wasteful practices such as leaving leftover food from a meal, needlessly ripping clothing, or throwing away household items or loose change without putting it to better use such as charity.

2. Kosher Slaughter

As mentioned previously, Jews are obligated to ritually slaughter animals before they are consumed. Although the source for ritual slaughter is in the Torah, many minutiae of the law are expounded in the Code of Jewish Law. The Biblical source for kosher slaughter is in *Deuteronomy* (12:21), which says "Slaughter from your herd and your flock which the Lord your God gave you, as I commanded you; and [then] eat in your gates according to what your soul desires." Many commentators express the opinion that one purpose of this commandment is that kosher slaughter is a humane way of killing that causes only minimal suffering to the animal. Rabbi Yosef Gikatlia indicates that animals undergo a spiritual lift by being incorporated into the body of man.[44] However since there is pain to the animal upon slaughter Jewish law prohibits the pronouncement of a blessing.[45]

However one must look no further than the expert consultant to the livestock industry, Temple Grandin, to understand that the ideal of Jewish ritual slaughter is not always is what it should be:

> I will never forget having nightmares after visiting the now defunct Spencer Foods plant in Spencer, Iowa fifteen years ago. Employees wearing football helmets attached a nose tong to the nose of a writhing beast suspended by a chain wrapped around one back leg. Each terrified animal was forced with an electric prod to run into a small stall which had a slick floor on a forty-five degree angle. This caused the animal to slip and fall so that workers could attach the chain to its rear leg [in order to raise it into the air]. As I watched this nightmare, I thought, 'This should not be happening in a civilized society.' In my diary I wrote, 'If hell exists, I am in it.' I vowed that I would replace the plant from hell with a kinder and gentler system.[46]

[43] 20 *Deuteronomy 19*.

[44] *Shaarei Orah*, The Gates of Light; Spain, 13th century.

[45] *The Code of Jewish Law YD* 28:2. *See also Code, Even Haezer 5:14* that plucking geese for feathers while they are alive, is permissible but people should refrain from such practices because it leads to bad character traits.

[46] Temple Grandin, *Thinking in Pictures: and Other Reports Prom My Life With Autism,* Vintage (October 29, 1996), pgs. 142-156.

Temple Grandin indeed studied the laws of ritual slaughter (shechita) and became familiar with the Talmudic dictates. She has devised newer restraint systems for the kosher slaughtering plants which provide a quicker and quieter way to do business and which provide a safer environment for the cattle and their handlers. She observed while working with the Rabbis doing the slaughtering that, "It is the religious belief of the Rabbis in the kosher plants that helps prevent bad behavior. In most kosher slaughter plants, the rabbis are absolutely sincere and believe that their work is sacred. The rabbi in a kosher plant is a specially trained religious slaughterer called a *schochet*, who must lead a blameless life and be moral. Leading a blameless life prevents him from being degraded by his work."[47] She concludes that Kosher slaughter without stunning can be done with an acceptable level of welfare when it is done correctly.[48] When shechita is performed correctly with the long knife, the cattle appear not to feel it.[49]

C. Fundamental Similarities and Differences between Man and Animal

On a very simple level Judaism recognizes that man and animal are both the same: both are flesh, blood and bones occupying a physical planet foraging for food and trying to survive. *Ecclesiastes* 3:19 expresses this notion when it describes that when all is said and done animals and men "have all one breath; the difference between man and beast is nothing." Judaism recognizes however that there are fundamental differences between man and animal including such characteristics as the power of intellect, the ability for free will, expression for advanced speech, tendencies for spiritual aspiration[50] and such plain physical indicia as the opposable thumb and erect posture. Despite the seemingly advanced nature and potential of humans to create and conquer, when naked man in his simplest form is compared to the animals of the world he appears to be the most physically helpless living thing insofar as such traits as speed, ferocity, size, strength, cooperation, and diligence are concerned.[51] Jewish tradition asserts that only when man develops his inner potential can he overcome these shortcomings.

Some of these fundamental differences between man and animal can play important roles in understanding animal welfare and the need to understand man's role in caring for other species. For example, although scientists attempt to quantify and explain the similarities and differences between the pain experienced by man and animal, this is a difficult area to compare. Jewish commentators on the other hand assert the possibility that indeed animal suffering is *worse* than human suffering exactly because an animal feels physical suffering to the fullest extent because they are unable to overcome the pain by finding meaning in it, like man is able to do.[52]

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[47] *Id*.
[48] *Id*.
[49] Available at http://www.grandin.com/ritual/qa.cattle.insensibility.html (last accessed 05/05/2011).
[50] *See* 3 *Ecclesiastes* 19-21 for a comparison between the spiritual qualities between man and beast.
[51] C.E.M. Joad, *For Civilization* (1940), p.3.
[52] *Rabbi David ben Solomon ibn Abi Zimra*; *Responsa of the Radvaz* 1:728; Rabbi Yair Bacharach

The esteem with which Jews give to animals is instructive in understanding the Jewish view on the purpose and rights which animals deserve. Although it is arguable whether there is true moral culpability for animals, Judaism surprisingly treats animals with divine reward and punishments as is apparent from several historical anecdotes. For burying Abel (Cain's brother), birds and beasts, were given the honor that the Jews recite two blessings: one for their slaughter and one upon covering their blood.[53] Frogs, dogs, and donkeys were divinely rewarded for their roles in Egypt during the ten plagues wrought upon the oppressors of the Jews. So too, divine punishment is applied to animals in various situations. During the deluge several animals in Noah's Ark were punished because of their interbreeding and promiscuity. During the era of Jewish slavery in Egypt horses in the Egyptian army were punished for chasing after the Jewish people.[54] Furthermore an ox that gores a man or woman is ordered to be tried by a court of 23 judges and stoned if found culpable.[55] Some commentators explain that the purpose of executing the ox is to punish the animal's owner as a warning to be more careful in watching his animal.[56] One commentator proposes the novel explanation that a murderous animal houses the reincarnated spirit of a person and it is that human spirit that is deserved of the punishment (*Rabbi Margaliyos)*. *Rabbi Sherira Gaon* states that God's reward and compensation to animals for the pain and suffering they endure in this world is given to them in the afterlife.[57]

In summary, one would have to conclude that the commandments in the Torah regarding animal law are *limited in scope* Only animals belonging to a Jew, who himself is commanded to keep the Sabbath, needs to be given rest on the Sabbath; humane kosher slaughter is a requirement only when the animal is to be eaten, but not when it is needed for fur or leather. While we many not muzzle an ox as it threshes, there is no general requirement to allow animals to eat freely; this commandment refers specifically to when it is actually working with the food. These two aspects are related. Ethical obligations to animals are commensurate with the benefit they provide us, and our relationship with them. Animals that work for us all week long rest on the Sabbath day; animals that help us with our loads should be helped when they are overburdened. Cruelty is of course forbidden towards any creature, but the higher levels of obligation are commensurate with the degree of connection with and benefit from the animal.

Responsa Chavos Yair 191.

[53] Midrash Genesis Rabbah 22:8.

[54] *See Midrash Tanchuma Noah 5* and *Talmud 108a*.

[55] *See* 21 *Exodus 28-29* and *Talmud Sanhedrin 2a*.

[56] *Rabbi Bechaye* to 21 *Exodus 28*.

[57] *Responsa HaGeonim* no. 375.

III: Foie Gras, Animals Rights, and Legal Bans

A. The Intersection between Animal Rights, Jewish Law and Foie Gras

Common estimates describe how 10 billion animals a year are killed for food in the United States (that's without counting the 20 million animals being used for animal testing and experimentation). Indeed more than 95% of all the country's animals are involved in food production.[58] Although ducks are a minority of these estimates they are still consumed with some passion in certain parts of the world. Most people enjoy eating, and this doesn't exclude the Jews. For some reason this is recognized by even the poets among us: the sixteenth century German poet, Hans Wilhelm Kirchhof of Kassel, wrote in 1562 that the Jews raise fat geese and particularly love their livers. However, the food we love is not always prepared in the ways that we think are best. Modern agribusiness in the United States presents many ethical and moral dilemmas especially in terms of the means and methods of animal production and specifically regarding the general welfare of the countless variety of animals involved. Legislators, politicians, lawyers and business owners often grapple with these dilemmas. Often left out of the debate however are the philosophers and experts in religious law. These types of individuals may be helpful in formulating policy and moderating the heated debate in the area of animal welfare, perhaps because they have a stake in forming opinions about closely held moral principles and ethics.

Even the history of foie gras itself is subject to debate. The delicacy of foie gras (pronounced *fwah grah*), or fattened duck or goose liver, is actually thought to date back some 5,000 years to the time of the Egyptian pharaohs and has spurred ethical arguments for much of that duration.[59] For most of the history of culinary cuisine animal fat has been a valued commodity, for its calories and nutrients as well as its usefulness in cooking and baking; squeamishness about eating fat is a relatively modern phenomenon among the western well to do. Sources indicate that for people who subsisted on a diet of noodles, cabbage, and potatoes, fattened goose liver was a precious source of nutrients. The Jews regarded it as a health food and dutifully fed it to growing children, since they would benefit the most from the additional calories.[60] Furthermore, fattening geese provided the added benefit of providing for cooking fat. The Jews are prohibited from using lard or suet and butter cannot be mixed with meat. Jews in Israel had used olive oil but this was scarce in Europe. The solution was poultry fat, called *Schmaltz* in Yiddish, which could be

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[58] Mark Caro, *The Foie Gras Wars: How a 5,000-year-old Delicacy Inspired the World's Fiercest Food Fight*. Simon & Schuster (March 10, 2009), pg. 56. A statuette of a fattened goose, dated to more than 4500 years ago from the Ancient Egyptian Empire, is exhibited in the Louvre.

[59] *Id*. at 26. Indeed some speculate that Jewish slaves were the ones doing the force-feeding all the way back in ancient Egypt.

[60] Jane Ziegelman &Andrew Coe, *A Goose for All Seasons: For Jews, Foie Gras Is Not Chopped Liver*, Moment Mag., June 30, 2000, available at http://www.momentmag.com/archive/june00/olam1.html.

obtained in large quantities from force-feeding geese. One of the most often repeated theories is that foie gras survived thanks to Jews who had learned of force feeding practices while under Roman rule and carried the tradition around Europe as they kept getting expelled out of countries. Other theories abound however that bring the history only to a couple of thousand years ago, or just several hundred. In the first century, for example, Pliny the Elder wrote of the practice of feeding geese dried figs to enlarge their livers.[61] Alternatively, some say that the first century chef to Caesar, Apicius, invented the fattened duck liver, by noticing that the ducks were dying because of overgrown livers. Silvano Serventi, who authored *Le Foie Gras* (2005), one of the best-regarded French histories, downplays Jewish influence in fois gras, saying it was not established until the 16th century. In the nineteenth century, the debate over the propriety of the practice continued, as Jean Anthelme Brillat-Savarin sided with the geese and ducks, writing that "they have not only been deprived of the means of reproduction, but they have been kept in solitude and darkness, and forced to eat until they were led to an unnatural state of fatness."[62] On the other hand, his contemporary, Charles Gerard, called the goose "an instrument for the output of a marvelous product, a kind of living hothouse in which there grows the supreme fruit of gastronomy."[63]

While once *foie gras* was made from goose liver, today over 70% comes from the disease resistant, sterile hybrid, the Mulard duck (a cross between the Muscovy and Pekin breeds). A preliminary issue to consider before assessing whether it is appropriate for Jews to partake of foie gras is the kosher status of the duck itself. The Torah outlines various species of animal that are kosher and those that are not in Leviticus 11:1-27 and Deuteronomy 14:3-20. When it comes to poultry, the issue is less clear however, as the Torah only delineates 24 species of birds that are not kosher. By inference the vast number of other bird species are kosher. Today, when the 24 non-kosher species can no longer be accurately identified however, things are complicated. From Jewish tradition, all kosher birds must have an extra toe, a crop, and a peelable gizzard.[64] Since these terms too can be hard to define, the accepted rabbinic rule is that only birds that have a bonified tradition (passed down from one generation to the next) of being kosher are accepted as kosher.[65]

Early Jewish settlers in America indeed treated it as kosher because it has all the reliable traits as other kosher fowl. (A peelable gizzard, an "extra toe", webbed feet, a wide beak, and the same "psuedo-crop" found in other ducks and geese). In the mid 1800's however disputes arose as to the duck's proper kashrus status. A rabbi in New Orleans banned the bird for his congregation based on the premise that there was no proper tradition for the duck. By the early 1900s however, rabbinical

[61] Pliny the Elder, Natural History, Book VIII, Ch. 77 (Teubner ed. 1909).
[62] Physiologie du gout (The Physiology of Taste), sec. III (1825).
[63] Charles Gerard, L'Ancienne Alsace a table (1862).
[64] Mishnah *Chullin* 59a.
[65] Another determinant of the muscovy's kosher status is based on a religious principle that states that if a suspect species can interbreed with a known kosher species, or chooses to breed with one if offered the option, can confirm the kosher status of the unknown species (the *hybridization* principle). Muscovy ducks indeed breed with other species of ducks.

figures addressed the issue again and concluded the muscovy was indeed kosher and has been consumed by the Jewish community ever since.

The question arises as to what extent Jewish law has a viewpoint on animal welfare in general as well as foie gras in particular.[66] It is most appropriate to gauge what the Jewish law says about these matters especially due to the suppositions that this delicacy perhaps originate with the Jews themselves. One passage in the Talmud is understood by some to be referring to the cruelty of force-feeding geese:

> Rabbah bar bar Chanah said: Once we were traveling in the wilderness, and we saw geese whose feathers were falling out due to their being so fat, and streams of fat flowed under them. I said to them, "Will I have a share in you in the World-to-Come? One lifted up its wing, another lifted up its leg. When I came before Rabbi Elazar, he said, "Israel is destined to stand in judgment on account of these."[67]

Although most commentaries understand this story cloaking deeper meaning, one opinion indicates that foie gras is the subject matter and that the Jews are delaying their Messiah's arrival because of the sins involved in causing pain to these geese. One prominent Jewish legal decisor records that the production of foie gras is prohibited because of the cruelty and attendant kashrus issues involved.[68] Other authorities do not go that far but nonetheless limit and legislate the extent of harm caused to the animal.[69]

A significant effort thus must be made to understand the types of pain the birds experience to come to a conclusion about how Jewish law should ultimately treat this subject. For example, as will be discussed infra., of the various possible harms that may result from force-feeding ducks or geese, one is damage to the esophagus when feeding tubes are put in the duck's mouth. Therefore, one Jewish authority recommends that one should feed the goose gently, using finely ground food, to prevent any damage to the esophagus.[70] Using other methods would cause damage and would invalidate the animal's kosher status.

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[66] *See* James A.R. Nafziger, Essay 8, in *The Influence of Religion on the Development of International Law,* Martinus Nijhoff Publishers, Edited by Mark W. Janis. (1999). Nafziger argues that religion can have a profound influence on international law.

[67] *Talmud, Bava Basra 73b*.

[68] Rabbi Ovadiah Yosef, *Yabia Omer vol. 9* YD 3.

[69] Even according to those authorities who permit foie gras, another practical problem arises because liver must be broiled under Jewish law in order to make it kosher. Properly broiling foie gras while preserving its delicate taste is an arduous endeavor few engage in seriously.

[70] Rabbi David HaLevi Segal (1586-1667), *Commentary on Code of Jewish Law YD, The laws of invalidated kosher procedures*, Section 33 (published 1692).

B. The Making and UnMaking of Foie Gras: Premonitions of a Ban from France to the United States

Anthony Bourdain, the American author and chef, has said that foie gras is one of the world's ten greatest flavors.[71] However, the amount of abuse a duck can or should withstand is crucial to consider in whether this flavor is worth the pain. In order for the legal community or the public to appreciate the options of how to tolerate foie gras (on the one hand) or how to appropriately abolish it (on the other hand) one must understand how the product is actually produced. The process in which foie gras is made is known as gavage, a fancy French name for force-feeding ducks large amounts of food over short periods of time.

For hundreds of years foie gras was made from geese, but France, the top producer of the food item, converted to ducks which are sturdier and easier to raise on a mass scale. The process of gavage begins when the ducks are 12 weeks old. (In comparison, non-force fed ducks are slaughtered somewhere closer to 5 weeks and commercial broiler chickens now are processed at 6-7 weeks of age.) Some defenders of foie gras would argue that it would be better to be a duck that experiences 12 relatively comfortable weeks before the start of force-feeding than a chicken who never sees daylight, packed in barn feather to feather with tens of thousands of other birds and gets slaughtered in the middle of its second month on earth. Furthermore, US foie gras producers kill about as many ducks a year - 500,000 - as some factories kill broiler chickens in a day.[72] (On average 20,00 ducks are killed by Sonoma fois gras per year.) However the main issue for many is how much of the process is actual torture and how much abuse, if any, is acceptable in this context?

In France and throughout Europe the issue of abuse is more clear-cut than in the United States. This abuse is much more pronounced in light of the increased consumption overseas. An important emphasis must be made about France, the largest producer, exporter and consumer of foie gras in the world. Actually foie gras is not much of an 'event' in France: it is sold in gas stations there. Consumption in France has been exploding as well over the past couple of decades. In 1991 France consumed about 9,000 metric tons, and in 2007 that figure exceeded 18,000 metric tons (using 35 million ducks).[73] France has even recently designated foie gras as part of its "cultural patrimony", a move which protects France's ability to produce, sell, and consume foie gras.

The methods employed in Europe are markedly substandard according to various studies and reports. One extensive study, referred to as The European Report (ERC) is quoted throughout the foie gras literature. The ERC, running 89 pages, properly called "Welfare Aspects of the Production of Foie Gras in Ducks and Geese" was one of the only comprehensive works about the feeding conditions'

[71] *Caro* at 6.

[72] *Id*. at 69.

[73] Spain comes in second internationally by (only) consuming 3,000 metric tons annually. As a comparison, the United States and Canada together consumed about 700 metric tons annually.

effect on the birds. It recognized up front that it is difficult to evaluate and measure how animals experience pain, states of disease, and frustration and stress. The report indicated that 80 percent of the ducks being observed for the report were being kept in individual cages during gavage - they could not spread their wings, move around, or engage in typical social behavior. The report concluded that industrialized force-feeding as currently practiced (as opposed to other methods) was detrimental to the welfare of birds. The authors found that the ducks appeared to be averse to force-feeding, and that their fat abdomens appeared to cause their legs to be pushed outward causing problems with standing. The bird's corticosterone levels, used to measure stress, were not so significant as to say one way or another. Further findings of the report included the fact that the gut capacity of the birds was sufficient for the feedings, although loose feces was rampant and the mortality rate (2-4 percent) was greater than non-force fed ducks (0.2 percent). Furthermore, liver function was impaired during feedings, although some of the problems were reversible and the report indicated that there was disagreement overt whether the bird's condition was considered medically pathological (diseased) or not. Panting was observed but scientific studies were not conducted on this.[74] Another problem is that the pre-slaughter mortality rate for foie gras production in Europe has been discovered to be fifteen times the average rate on other duck factory farms.[75] The precise causes of these deaths have not been documented, but are likely due to physical injury and liver failure.[76] Controversies rage over how much pain and harm is inflicted upon geese and ducks in foie gras production today.[77]

Foie gras production in the United States is somewhat of a different story than in Europe. The two main sizable US foie gras farms are Sonoma Foie Gras in California and Hudson Valley Foie Gras in New York. (American restaurants buy more Hudson Valley product than any other producer.)[78] The birds here are free ranged then moved to group pens. The ducks are generally kept in gavage for 28 days, although at Hudson Valley they are experimenting with transitioning to a 21-day gavage period. The birds are fed three times daily. (The free range and group pen method is in contradistinction to the Canadian and French farms where cramped cages are utilized.) Each feeding of a singular bird takes 2-10 seconds each time. The gavage process itself is said to mimic the way birds gorge themselves naturally before taking migratory flight in order to store extra food.

At Hudson Valley each feeder is assigned 300-350 ducks to oversee for 28

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[74] *Caro* at 167.

[75] *Welfare Aspects of the Production of Foie Gras in Ducks and Geese*, European Union's Scienitific Committee on Animal Health and Animal Welfare, December 16, 1998, section 5.4.7.

[76] *Id*. section 8.1.

[77] *See* Guemene D., Guy G., et al., "Force Feeding procedure and physiological indicators of stress in male mule ducks" *British Poultry Science* 2001 Dec. 42(5):650-7. The paper concluded "we observed no significant indication that force-feeding is perceived as an acute or chronic stress by male mule ducks, in our experimental conditions."

[78] New York appropriated $420,000.00 in 2006 to Hudson Valley Foie Gras in order for it to expand and develop its production capabilities thereby encouraging the development of a New York business.

days of gavage. This is compared to other farms which have a 900 to 1 ratio. The low ratio allows the birds to become familiar and comfortable with their exclusive human contacts. The workers are even paid bonuses based on the ducks' health and quality of their lives at the end of the feeding process.[79] Although Hudson Valley is the biggest foie gras producer in the country, processing 4,000 to 6,000 ducks a week, it raises birds by the traditional model, instead of the industrial one. That means that everything from the egg hatching to the 21-day force-feeding period and the slaughter happens on the same farm, tended to by the same workers. The farm utilizes animal-welfare consultants, including Dr. Ericka Voogd (a colleague of Temple Grandin) and Dr. Tirath Sandhu, an avian scientist, who is retired from the Cornell Veterinary School.

i. Background to a Ban

Farm Sanctuary, the American animal protection organization, reports that a 2005 Zogby International poll showed that 75-80 percent of the public support a foie gras ban.[80] Fois gras is indeed seen as the 'key in the door' by many activists and once action is taken to ban foie gras activists can move on to veal, chicken and other issues. In addition to the obvious pain caused to ducks in the process of making foie gras, other interesting factors have led the public to board the bandwagon to prohibit the delicacy. These factors include the product having a funny French name; the fact that it is enjoyed only by the relatively affluent and therefore common people can feel better about objecting to its consumption; it remains unknown to your average Tyson chicken eater and will not adversely affect their opinion; and of course it's made from cute ducks - and the public tends to just like ducks. (cf. Daffy, Donald, and Aflac).[81] The counter argument to some of these contentions is that although the image of a tube down the throat is nauseating, human biology (as distinct from the duck) doesn't allow us to swallow whole, spiny fish.[82] Furthermore, ducks don't have a gag reflex as humans do. Humans also don't routinely store fat in their livers.

Many argue that the process is detrimental to the duck's health. Force-feeding of ducks continues for up to a month, by which time the birds' livers have swelled up to ten times their natural size. The resulting swelling of the liver is considered by some to be pathological "hepatic lipidosis" or "fatty liver disease." The dramatic increase in liver size also makes walking and breathing difficult. Mortality levels increase, and the birds would die if they were not taken for slaughter. During testimony given during the legislative hearings of the Chicago ban (discussed infra.), Dr. Holly Cheever, vice president of the New York Humane

[79] *Id*. at 102.
[80] *Id*. at 115-116.
[81] *Id*. at 11.
[82] *See* Daniel Guemene *Force Feeding: An Examination of Available Scientific Evidence* (available at *funnelsforduckies.com/study2.pdf) Link is no longer available. Found the article at: http://www.artisanfarmers.org/images/Foie_Gras_Study_by_Dr._Guemene.pdf*

Society, a Harvard educated veterinarian, and an occasional consultant to PETA, indicated that,

> The ducks are grabbed and have a rough inflexible metal tube jammed down their esophagus three times a day while they are being forcibly restrained. Once they can no longer walk, because they are crippled by their swollen abdomens, they are seen pathetically dragging themselves on their wings to try to escape the humans who are feeding them. She went on to say the ducks have fungal infections, bacterial infections, fractures, arthritis, severe esophageal trauma, horrendous scar tissue, and various ruptures. Some of them have choked to death. There is food in their esophagus spilling out of their mouth and spilling out of their nostrils. We all know what liver color looks like. This is a swollen, dripping, butter-yellow organ that I could never with all my years of veterinary medicine identify as a liver if I hadn't been pre-warned that that's what it is. While they're alive they pass abnormal stool. It's bright green liquid diarrhea. I would just as soon eat out of a cat box as eat a liver from one of these diseased animals.[83]

In response to such testimony, Marcus Henley, Hudson Valley's Operation manager, reported that although long ago they had briefly experimented with the cramped, individual cages shown on the tape, his farm and others in the United States exclusively had been using more spacious group pens for years. He cited studies by French researcher Daniel Guemene, showing that foie gras birds don't experience heightened stress, the birds at Hudson don't avoid the feeders, and invited the lawmakers to visit the farm to see for themselves. Many of the witnesses had never been to a foie gras farm. He said they would see 100,000 ducks residing in 17 football fields worth of barns. He testified that if you took 100,000 people, you'd no doubt find some who were sick or in otherwise hideous shape, but you wouldn't videotape those unfortunates and hold them up as representative of the entire population. Kay Wheeler, a retired Department of Agriculture inspector (and general veterinarian), who had been working with Hudson Valley farm in biosecurity practices, also testified that the farm's ducks were not being mistreated, their stress was minimal, postmortems on 600 ducks found no lesions on their esophagi, that the notion of the tube inflicting damage was a myth and that the livers aren't diseased because storing fat is one of their natural properties.

To make conclusions about whether the whole foie gras process is torture or abusive is very difficult. Some scientists in the United States focus on biological measures of welfare, such as the absence of stress hormones and the satisfaction of basic biological needs. Yet, according to one prominent animal welfare researcher, biological measures are frequently not accurate if used as the exclusive, or even primary, method of judging welfare. Instead, they should be used only to corroborate the results of behavioral studies, including preference tests "in which the animal is

[83] *Caro* at 130-131.

allowed to choose some aspect of its environment, on the assumption that the animal will choose in the best interests of its welfare."[84]

Similar sentiments were relayed by Temple Grandin.[85] The owners of Hudson Valley indeed asked Grandin to visit their farm and advise on how it can improve. Grandin had sent her people to Hudson Valley and her concerns were not with the force-feeding per se, but with pH levels in the ducks bedding, and that their feet and legs had sores. Hudson has been working on these issues. She commented that, "It's unnatural to make the liver grow that big, but it doesn't cause a welfare problem as long as the birds are walking around, the birds are not hyperventilating, that they're not so weak they can hardly move." She said the only way to ensure foie gras production was not cruel was simply to observe and watch the ducks behavior. Watching the ducks' behavior, however, is just the thing that has led many to seek the banning of the product.

C. The Ban of Foie Gras in Several Contexts

Foie gras production has been banned in at least 15 countries and other forums around the world. The production of foie gras has been banned in Britain, Denmark, Germany (which, in 2002, became the first country to grant animals a constitutional right), Switzerland, Poland, Italy, Luxemboug, Croatia, Norway, The Czech republic and much of Austria. (Even in France, individual cages have been banned as of 2015). However, even though production is banned, it still could be bought and sold in many of these places. Public establishments, airlines, and personalities have also taken action as well for policy and public image purposes. Hundreds of restaurants have decided to take foie gras off their menus. In 1994, Air Canada stopped serving fois gras in 1st class due to pressure from PETA. In 2002 Cardinal Joseph Ratzinger came out to say how degrading fois gras is and how it contradicts the "relationship of mutuality" in the bible. On February 26, 2008 Prince Charles even ordered a royal ban on foie gras. On the other hand you have places like China who would like to increase production. In 2006 a member of a Chinese delegation visiting southwest France said his company plans to ramp up foie gras production with the aspiration to reach 1,000 tons over the next five years.[86]

The foie gras battles around the United States, while some taking effect under legitimate legal routes, are mostly fought in the streets using tactics such as vandalism, demonstrations, harassment and intimidation of commercial restaurants.[87] Hugs for Puppies, an animal rights group in Philadelphia (now called the Humane league of Philadelphia), for example, staged many protests at the city's

[84] See I.J.H. Duncan, *Science-Based Assessment of Animal Welfare: Farm Animals*, 24 Rev. Sci. Tech. Off. Int. Epiz. 483, 486 (2005).
[85] PETA founder Ingrid Newkirk has described Temple Grandin as having "done more to reduce suffering in the world than any other person who has ever lived." *Caro* at 291.
[86] *Caro* at 86.
[87] *Caro* at 149-150.

restaurants causing quite a stir.[88] Although counter arguments have been made that banning foie gras is unconstitutional,[89] these arguments are unconvincing and the ban proposals and battles on the streets continue.

Some bans which are either pending or have failed include ban proposals in Connecticut, Hawaii, Illinois[90] (as separate from the city of Chicago), Maryland,[91] Massachusetts, New York, New Jersey, Oregon, and Washington,[92] as well as the cities of San Diego (as separate from the state of California), and Philadelphia.[93] Some of these contexts are worthy of comment to illustrate some of the commonalities and differences. The Connecticut version, introduced in 2007, is among the broadest of all attempted foie gras bans, providing "the general statutes be amended to prohibit the production or sale of any food item produced by force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[94] The version in Hawaii even goes so far as to criminalize the sale of any portion of a bird that was deemed to have been force-fed.[95] The Massachusetts proposal criminalized foie gras by applying a separate violation subject to separate fines: (1) each time an individual bird is force fed; (2) on the first day that a prohibited product is offered for sale; (3) every day that a prohibited product continues to be offered for sale; and (4) upon consumption of any prohibited sale by delivery of the prohibited product.[96] The proposed legislation in New York[97] does not even address the sale of foie gras, or attempt to regulate any such transactions, but they both seek to make illegal the

[88] A famous French restaurant, Le Bec-Fin, even obtained an injunction settlement against Hugs for Puppies in which they were not allowed to stand within 10 feet of the restaurant or to use bullhorns. See *Caro* at 189.

[89] These arguments are based on the (Dormant) Commerce Clause or because it is too vague or overbroad on its face. For example, since the proposed legislation makes no assertions regarding negative human health impacts from foie gras one author argues that the product shuold not be within the purview of restrictions under the Commerce Clause. Alexandra R. Harrington, *Not all it's Quacked up to be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, *12 Drake J. Agric. L. 303, 316-319* (2007). *But see* Illinois Restaurant Assoc'n v. City of Chicago 492 F. Supp. 2d 891 (2007), where the court dismissed plaintiffs contentions that the Chicago ordinance to ban foie gras violated the police powers of the Illinois Constitution and the US Commerce Clause.

[90] S.B. 312, 95th Gen. Assem., Reg. Sess. (Ill. 2007); S.B. 413, 94th Gen. Assem., Reg. Sess. (Ill.2005); H.B. 867, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

[91] *See* S.B. 599, 2008 Gen. Assem. (Md. 2008); H.B. 1137, 2008 Gen. Assem. (Md. 2008). In March 2008, the Maryland legislature shot down a proposed ban of the sale and production of foie gras even though 13 senators and 41 house members had co-sponsored the respective bills. The senate bill's chief sponsor, Joan Carter Conway, after a tour of Hudson Valley, backed down from the legislation.

[92] *See* H.B. 2421, 59th Leg., 2006 Reg. Sess. (Wash. 2006).

[93] PHILA., PA., CODE § 9-600, §629, BILL NO. 060476 (Phil., PA. 2006).

[94] *See* H.B. 6866, 2007 Gen. Assem., Jan. Sess. (Conn. 2007).

[95] *See* H.B. 3012, 2005 Leg., 23d Sess. (Haw. 2006); S.B. 2686, 2005 Leg., 23d Sess. (Haw. 2006). And more recently, Senate Bill 2170 applying a $10,000 fine.

[96] *See* S.B. 2397, 184th Gen. Court, 2006 Reg. Sess. (Mass. 2006); S.B. 498, 184th Gen. Court, 2005 Reg.

[97] *See* Assem. B. 6277, 230th Annual Legis. Sess. (N.Y. 2007); S.B. 1463, 2007 Reg. Sess. (N.Y. 2007).

force-feeding of a bird, "by hand or machine, for the purpose of fatty enlargement of such bird's liver." The New Jersey legislature focused solely on the production of foie gras, and did not attempt to ban the sale of foie gras or products containing it.[98] The state of Oregon made the use of force-feeding a misdemeanor, and created the "crime of trading in force-fed products," which would have been committed whenever a person "offered for sale or delivered one or more food products that the person knows to have been produced in whole or in part by force-feeding a bird."[99] The City of San Diego is notable insofar as delineating the purpose of the ordinance was to "protect public morals and general welfare, protect the reputation of the City of San Diego; and support those businesses that have stopped selling foie gras before the state law takes effect."[100]

The most significant bans however are the ones that actually were passed in the following jurisdictions:

1. The California Ban

Governor Arnold Schwarzenegger signed SB 1520 into law on September 29, 2004 which made it so that by July 1, 2012 foie gras would be banned – ie. both the force-feeding of ducks and the sale of the product. The bill was supported by a broad coalition of animal protection groups, including the sponsors - the Association of Veterinarians for Animal Rights – as well as Farm Sanctuary, Los Angeles Lawyers for Animals, Viva!USA, and of course more than a dozen top celebrities. Some efforts had been made to try to repeal the California ban just as had happened in Chicago, but to no avail often because of other animal rights initiatives taking place.[101]

In California, the legislation enacting the ban defines "force feeding a bird" as "a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily while foraging. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into a bird's esophagus." The bill proceeds to outlaw force-feeding a bird "for the purpose of enlarging the bird's liver beyond normal size, or hiring another person to do so," and specifies that "a product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."

[98] *See* Assem. B. 3230, 212th Leg., Reg. Sess. (N.J. 2006).
[99] *See* S.B. 861, 73d Leg. Assem., 2005 Reg. Sess. (Or. 2005).
[100] See SAN DIEGO, CAL. CODE ch. 5, art. 2 (2006) (amending Chapter 5, Article 2).
[101] In 2008, for example, California was very busy with getting Proposition 2 passed, which it did. That piece of legislation was aimed at creating a landmark in the battle against factory farming. It was called the "Standards for Confining Farm Animals" initiative and was set to prohibit veal crates, sow gestation crates and hen battery cages.

2. The Chicago Ban and Subsequent Repeal

The Chicago ban was in some ways more important than the ban that took place in California. Chicago had been immortalized as the "hog butcher for the world" by poet Carl Sandburg and made notorious by Upton Sinclair's 1906 novel and meatpacking expose *The Jungle*. As Mark Caro, the Chicago Tribune reporter, put it, "The California ban had come with a big asterisk of a seven-and-a-half-year waiting period, and the rest of the country considered California to be vaguely nuts anyway. But Chicago was a sensible heartland-values city, and if it decided that a yucky-sounding French delicacy should be banned, who could argue?"[102]

The ban of foie gras in Chicago was first initiated as a result of a famous restaurant banning it without provocation. Charlie Trotter, owner of the restaurant with his name on it, felt the product needed to be taken off his menu because it did not meet the high standards he had for the food he made. Trotter unilaterally took foie gras off the menu without provocation. Around the same time, Illinois state senator Kathleen L. "Kay" Wojcik, a Republican, introduced the "Force Fed Birds Act." The act "Prohibits force feeding birds and selling products that are the result of force feeding birds. Violation is a petty offense with a fine of $1,000. Each day is a separate offense." However her bill died on 1/9/2007.

The foie gras ban that eventually passed on April 26, 2006, was called for by 49th Ward Alderman, Joe Moore, who chaired the Health committee.[103] The actual vote to ban the delicacy, which was to have an effective date of August 22, 2206 (although it was delayed for a day), occupied less than a minute of the full council's attention because it was in omnibus bill with so many other provisions that nobody noticed when it was called. The city subsequently challenged the ban in court, but the court found that the Chicago ordinance reflected the city's judgment that banning the sale of foie gras would benefit the city and advance the morals of the community.[104]

In Chicago, "the people of the City of Chicago and those who visit here have come to expect, and rightfully deserve, the highest quality in resources, service and fare" and "by ensuring the ethical treatment of animals, who are the source of the food offered in our restaurants, the City of Chicago is able to continue to offer the best dining experiences... "[105] The bills made it illegal to "force-feed a bird for the purpose of enlarging a bird's liver beyond normal size or hire another to do so" and providing that "a product may not be sold, served, or dispensed in this State if it is the result of force-feeding a bird for the purpose of enlarging the bird's liver beyond normal size." The bill borrowed the California language to define force-feeding a bird, and simply defined a "bird" as "includes, but is not limited to, a duck or goose."[106]

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[102] *Caro* at 144.

[103] Chicago has 50 aldermen, many of which were enforcers of Richard Daley's firm rule. Moore was not one of these types. Moore was known for sponsoring an ordinance opposing a U.S. preemptive strike in Irag in January 2003.

[104] Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891 (2007).

[105] CHICAGO, ILL, Ordinance 7-39-001 (Apr. 26, 2006).

[106] *See* Ill. H.B. 867 § 5(a)(2); Ill. S.B. 312 § 5(a)(2).

The mayor made a public pronouncement that it was the silliest law ever passed by the city council. The Health Department didn't proactively raid restaurants in search of outlawed livers; it relied upon consumers calling the city service hotline. By the end of 2006, warning letters had been sent to nine restaurants, and only one fine was issued for $250.00. Although the ban applied to the sale of the liver from force-fed duck, the rest of the bird could still be sold. There became a culinary underground in Chicago (what some called secret roaming supper clubs) which still served the liver around town. The efforts to repeal the foie gras ban were sponsored by city council members Burt Natarus and Bernard Stone in 2006 with the mayor's approval. The actual repeal was not voted on until May 14, 2008 with 37 yeas, and 6 nays but did not go into effect until June 11, 2008. Therefore, the sale of foie gras in food dispensing establishments in Chicago was only illegal for just under 26 months.[107]

3. The Israel Ban

One of the most interesting bans of foie gras has been the recent ban from the Israeli Supreme Court.[108] Foie gras was first introduced to Israel in 1948 (the same year the state was founded) by a holocaust survivor by the name of Moshe Friedman. It was actually one of Israel's' first exports. Israel was indeed among the world's top exporters behind France of course. The ban, from 2003, is significant especially because of the aforementioned history involved with the Jewish people and the production of foie gras. Indeed, it was a historic decision because it is one of the first instances of a court applying an anti-cruelty law to a common farming practice, and one of the few examples of the judiciary discussing the issue with seriousness and intelligence.[109] Although the ban itself did not take effect until July 2005 it was apparent that force-feeding still took place until February 2006 when the High Court instructed authorities to enforce the court order.

The Israeli case was originally brought in 1999 as an action to invalidate regulations pursuant to administrative law. Israel's system for regulating farmed-animal welfare is based in a statute of broad application, the 1994 *Cruelty to Animals Law* [Protection of Animals Law]. Section 1 of that law defines animals as "vertebrate animals, excluding man." Section 2 provides, in pertinent part, "A person will not torture an animal, will not be cruel toward it, or abuse it in any way." The action was brought by a coalition of Israeli animal-protection

[107] *See* CHICAGO, ILL., MUN. CODE § 7-39-001 (2006) (adopted Apr. 26, 2006), *repealed by* Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

[108] [HCJ 9232/01 *Noah v. Att'y General* [2002-2003] Isr.SC 215, 215. The English translation can be found on the High Court website: http://elyon1.court.gov.il/eng/home/index.html (follow "Decisions of the Supreme Court" hyperlink, then enter "Noah" in "Parties" field).

[109] Mariann Sullivan and David J. Wolfson, *What's Good for the Goose ... The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*. 70 Law & Contemp. Prob. 139 (2007), 140.

organizations known collectively as "Noah." The organization petitioned the Supreme Court of Israel for an order requiring the Minister of Agriculture to issue regulations prohibiting the force-feeding of geese for the production of foie gras. At the time of the Noah petition, Israel's foie gras industry was the fourth largest in the world. It had existed for about forty years and had developed with the support and encouragement of the Ministry of Agriculture. Israel produced over 500 tons of foie gras per year, half of which went to the local market and half of which was exported. The annual turnover of the industry was tens of millions of shekels [the Israeli form of currency].[110] According to industry sources, at least 600 families depended on foie gras production for their livelihoods.[111]

To look briefly at the various opinions espoused in the Supreme Court ruling may offer insight into how the issue of animal welfare may evolve in other judicial forums and how Jewish law might respond in the future. There were only three opinions put forward – those by Justice Asher Grunis, Justice Strasberg-Cohen, and Justice Eliezer Rivlin. Justice Grunis writing in the minority, held that force-feeding should not constitute cruelty within the meaning of the statute. He described that the status of animals is changing and that the moral relationship between humans and animals raises the question to what extent, animals should serve the needs of men.[112] He expressed the concept however that humans should be considerate of the welfare of animals and that the use man makes of animals should be restricted, with the aspiration of gradually improving their situation. Although he quoted from the European Council Report (ECR) which found that force-feeding is detrimental to the welfare of the birds, under Israeli law (whose principles are derived from both British and Jewish religious law) animals are considered mere property, albeit property as to which the owner's rights may be limited. He admits that it is difficult to assess the suffering of animals but that imposing a complete ban on the agricultural industry would have far-reaching economic and social consequences. He opined that some form of transition would be necessary as "it is unacceptable to transform those who have been employed in force-feeding geese for decades into felons in a day."[113]

The majority opinion however followed Justice Strasberg-Cohen, to whom Justice Rivlin concurred.[114] She declared the regulations invalid but understood the repercussions should the High Court declare the practice of force-feeding illegal overnight. She proposed a novel solution she termed "relative invalidity" which would create a transition period in which the outlaw would not take final effect for

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[110] *Id*. 144.

[111] Daniel Kennemer, *Foie Gras Industry's Goose Cooked*, Jerusalem Post, Mar. 19, 2006, available at http://www.jpost.com/servlet/Satellite?cid=1139395631583&pagename=Jpost%2FJPArticle%2FShowFull.

[112] *Noah* at 224.

[113] Id at 243.

[114] He poetically reflects that animals "possess a soul that experiences the feelings of happiness and grief, joy and sorrow, affection and fear" and denies a biblical allusion which some may want to employ to exploit the birds (Job 5:7) as beyond the dignity of man.

a couple years down the road. She expressed the need to protect the interests of animals, specifically referencing the roots of this obligation in Jewish religious law. She emphasized that under Israeli law there is a balancing test between the interests of humans and the interests of animals.[115] She eloquently quoted the powerful language that "an enlightened society is not measured only by its attitude toward people, but also by its attitude toward animals."[116] Of interest in her opinion is that she utilizes comparative law of the United States to make her point as well. She reveals that thirty states in the US have ironically excluded "accepted" animal husbandry/agricultural practices from the application of animal protection laws. This backward thinking in her mind makes no sense. She eventually relied heavily on the ECR report that force-feeding causes suffering. She also finally made an important distinction (often argued by many) that there is a fundamental difference between "luxury" food items and "necessary" food products. Foie gras, in her opinion, squarely fell in the luxury category and only allows for a very low threshold for animal pain.

As far as animal reform is concerned, the *regulatory approach* implemented in Israel, offers several ideal advantages over *criminal statute* schemes found more prevalent in such countries as the United States. As Justice Strasberg-Cohen mentioned, the use of incremental steps over an extended period of time are one marked advantage. Other benefits include the existence of specific and clear and provisions for quicker agency reaction times and flexibility. These characteristics also enable a system to sort through and rely on scientific findings in formulating policy, for providing for inspection and enforcement systems, and for judicial review of agency action.

However this is an ideal that has not been realized in the United States because of several reasons. Agency bias, the corporate power and influence of agribusiness, great differences in the law regarding both (prudential) standing and standard of review, as well as the overall deference given to agency actions by the courts are the main reasons for this occurrence. Israeli courts are indeed lenient on the issues of standing, and frequently hear petitions brought by public organizations with no personal interest in the dispute.[117] Reforming the way agribusiness is conducted in the United States is no easy task.

IV. The Secular and Jewish Responses to Foie Gras and Animal Welfare

Proper investigation and due diligence would have to be at the forefront of coming to any conclusions about the best manner in which to deal with animal welfare issues. It often occurs that proponents of either side of the debate fail to actually visit the farms or plants that they propose should be shut down or banned.

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[115] For example, she quoted another Israeli case, *The Cat Welfare Society of Israel v. Municipality of Arad* (HCJ 6446/96) wherein stray cats had "a right to live" but the danger of spreading infectious disease to humans was adequate to overcome that right. (at 272).

[116] Explanatory Notes to the Cruelty to Animals Bill, 1992, at 298.

[117] Phillip Mattera, USDA, Inc.: *How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture* 8 (2004), available at http://www.agribusinessaccountability.org/bin/view.fpl/1198/cms category/1836.html.

This failure to investigate the exact procedures used, and the actualities on the ground in the food production arena, does not bode well for bolstering arguments. During the California debates, for example, there was extensive testimony given by players who had never been to the Sonoma foie gras plant. California Senator Michael J. Machado (D-Linden), himself a farmer, told his colleagues that he recently spent several hours at Sonoma Foie Gras and found that the witness's negative descriptions "were not borne out in practice."[118] He reported that the ducks didn't show resistance to the feedings, and their handlers didn't have to struggle with them to insert the tubes.

Taking into account that the animal welfare standards in the United States are among the lowest in the world, and that the sheer size of modern industrial farming is almost impossible to contend against without huge financial resources and political clout, the problem of animal welfare reform cannot be easily untangled. On the other hand, it has been argued that the bans and proposed bans occurring in the United States are having negative unintended consequences for animal rights activists. For example, the U.S. market for foie gras has doubled over the past several years, but almost all of the growth has benefited Canadian and French producers. Hudson Valley's share of the U.S. market had been 80 to 90 percent in past years, but is now down to about 45 percent. It doesn't make sense to outsource production of foie gras to countries that have worse track records than the United States.

It is often remarked that social change can be accomplished by individuals who feel strongly enough about an issue that they will stay the course. This axiom sometimes holds true in the legal world, just as it does in the non-legal world. A private right of action, while nowhere near unanimous, has been a trend in certain states. A few states permit some type of private enforcement of anti-cruelty laws, whether by individuals or by organizations dedicated to the protection of animals. These include North Carolina, New Jersey, and Pennsylvania.[119]

Jewish law might go further and advise the complete abolition of foie gras from the international palate. As mentioned earlier, some fundamental Jewish concepts contend that the ideal state for people should hearken back to the garden of Eden: man's initial state was that of an herbivore, and will return to that state in the future once more. However that might not be the most practical or effective argument to make now, since too many interests are at stake.

Several more practical alternatives to foie gras abound in the short term. During the Chicago ban, some restaurants in the city offered "faux gras" (imitation fois gras), made with regular chicken liver, which was very close to the taste of the real thing. More recent attempts have been made by chefs to make foie gras more user friendly. According to them, Foie gras "doesn't have to hurt." Eduardo Sousa is a free-range farmer in Spain producing foie gras without gavage. The ducks he raises on his farm naturally gorge themselves without being forced by humans. When his artisanal foie gras was deemed too dull and gray in comparison to the

[118] *Caro* at 83.

[119] See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, *9* Animal *L.* 243 (2003).

bright yellow livers of geese raised by force-feeding, Sousa planted bright orange flowers native to the area around the grounds of his farm. The geese feasted and his blindingly yellow foie gras was born.

Innovation within the Jewish community is required. One method to innovate is through the certification agencies which oversee food production at all stages of the process. The Conservative movement of Judaism has begun a new standard called the Hekhsher Tzedek Commission or *Magen Tzedek* (shield of justice) certification. This kosher certification is intended to supplement rather than replace traditional kosher certifications. The Commission states that it is "a preventative to the unethical practices that have sadly seeped into the kosher food industry." The guidelines will look at everything from a manufacturer's family-leave policies to its recycling programs. The organization says that social justice is their aim; an effort that was spurred by concerns about unethical and illegal employment practices at the Agriprocessors kosher meatpacking plant in Iowa. The organization has published 175 pages of guidelines which are divided into five areas of "social justice" - employee wages and benefits; health, safety and training; humane treatment of animals; the company's environmental impact; and corporate transparency. Magen Tzedek is arguably the most ambitious effort any U.S. group has applied to food, even with its limited-scope.[120] Orthodox Judaism also has its own group, Uri L'Tzedek, which recently began certifying New York area kosher restaurants based on their adherence to labor practices; 15 restaurants and grocery stores earned its "Tav HaYosher" (Certified Good) label. The group claims to reinforce New York city, State and federal labor laws in regards to worker rights and work environment.[121] It is not as far as *Magen Tzedek* has come, but it is a good start.

Some businesses in the Jewish community offer other innovative solutions to resolve the issues of animal pain and abuse. KOL Foods is a kosher, non-industrial, grass-fed meat business started in July 2007 in Washington DC by Devora Kimelman-Block. KOL works with 10 small farms, mostly on the East Coast, and maintains that the ethically raised animals are treated better, and allowed to carry out their natural behaviors.[122] Other similar operations include Kosher Conscience (a small poultry- and meat-buying cooperative in New York devoted to the humane treatment of animals at every stage of the process),[123] Mitzvah Meat (another project out of New York),[124] The Green Taam, (providing kosher pasture raised chicken, duck, and turkey to communities in Ohio), and LoKo (a small poultry co-op out of Boston where members are encouraged to witness the chicken slaughter and help pluck the feathers).

Professor and activist Michael Pollan of the University of California at Berkeley, frequently writes of man's relationship between food and nature. In

[120] *See* Magen Tzedek. *Available at* http://magentzedek.org.
[121] Uri L'Tzedek. *Available at* http://www.utzedek.org/tavhayosher.
[122] KOL Foods. *Available at* https://www.kolfoods.com.
[123] *Id*.
[124] Mitzvah Meat. *Available at* http://www.mitzvahmeat.com/Home.html.

his book *The Omnivore's Dillemma* he outlines the four basic ways in which human societies have obtained food: the current industrial system, the big organic operation, the local self-sufficient farm, and as hunter-gatherers. He critiques modern agribusiness and says that there is a fundamental tension between the logic of nature and the logic of human industry; the way we eat represents our most profound engagement with the natural world, and that industrial eating obscures crucially important ecological relationships and connections. He has a famous maxim: "Eat food. Not too much. Mostly plants."

The best method may be like the one employed by Joel F. Salatin, a farmer in Swoope, VA; he employs holistic methods of animal husbandry, free of harmful chemicals, based on the principle of emulating animal's natural activities as closely as possible.

Until we get to this point, however, we will be reliant upon the agribusiness cycle we have created and ultimately support. The ultimate answer lies in making the best of the resources that we have, continually striving to better the conditions of the animals, and the procedure we employ to bring those animals into our homes.

CASE LAW REVIEW

CATHERINE TUCKER

Case	Citation	Summary of the Facts	Summary of the Holding
State v. Kuenzi	2011 WL 659380 (Wis. App.)	While operating snowmobiles, defendants came across and allegedly "charged" several deer in a field. Defendants proceeded to torture some of the downed, live deer by performing a "burn out" with a snowmobile on top of one and securing a strap around another's neck and tying it to a tree. Under the Wisconsin animal cruelty statute, the State charged each defendant with several counts of felonious animal mistreatment. Defendants motioned to dismiss the charges on the grounds that their conduct could not be prosecuted under the animal cruelty statute because the statute's prohibitions did not apply to "non-captive wild animals," like deer. Instead, defendants argued that their conduct must be analyzed exclusively under state hunting regulations. The district court granted defendants' motion to dismiss, and the State appealed.	On appeal, the State acknowledged that the cruel mistreatment of wild animals must be considered in view of common hunting practices, which often cause pain and suffering. The State urged the court, therefore, to consider in the instant case whether defendants' alleged conduct caused "*unnecessary* and *excessive* pain or suffering or *unjustifiable* injury or death" to the deer. Defendants contended, however, that this inquiry would justify prosecution of *all* hunting activity. To avoid this unlawful result, defendants argued that any taking of non-captive wild animals must be analyzed under state hunting regulations alone, not under the cruelty statute. The appellate court, however, rejected this argument, and reversed the lower court's decision to dismiss the charges against defendants. In its reasoning, the court emphasized that the State's position did not amount to a blanket prohibition of all hunting activity because it only required prosecution of activity rising to the level of unnecessary or excessively cruel treatment. Moreover, the court reasoned that if the legislature had intended to exclude wild animals from the protections of the cruelty statute, it would have done so expressly. Absent such express language, the court held that defendants' actions fell within the conduct addressed by the statute and remanded the case for reinstatement of the charges.

Case	Citation	Summary of the Facts	Summary of the Holding
Kauffman v. The Pennsylvania Society for the Prevention of Cruelty to Animals	2011 WL 601623 (E.D. Pa.)	Plaintiff and his family, who operated a dairy farm, owned several pet dogs and occasionally sold puppies to community members. After she received a complaint that the puppies plaintiff was selling were "sick, defendant, an employee of the Pennsylvania Society for the Prevention of Cruelty to Animals (PSPCA), went undercover to the farm to investigate. Upon arrival, she discovered five puppies living in a pen that smelled of urine and contained feces. Defendant purchased four of the puppies and brought them to PSPCA headquarters, where they were examined by a veterinarian who determined that the animals were suffering from anemia, parasites, and ringworm. With the approval of the Assistant District Attorney, defendant secured a warrant from a magistrate judge to search plaintiff's property and to seize all animals and animal-related records. After she and another PSPCA employee executed the warrant, defendant charged plaintiff with ten counts of animal cruelty. Though all counts were later dismissed by a district court judge, defendants refused to release the seized animals back into the plaintiff's care. In response, plaintiff filed a claim under 42 USC §1983, alleging that defendants had unconstitutionally searched and seized his property. In addition, he filed a claim for the common law tort of conversion, alleging that defendants had unlawfully deprived him of property by refusing to release the dogs into his custody. In response, defendants filed a motion to dismiss the constitutional claims under F.R.C.P. 12(b)(6).	The district court granted defendants' motion to dismiss in part and denied it in part. Regarding the PSPCA employees' initial undercover investigation of the farm, the court refused to extend qualified immunity to shield the employees from plaintiff's claim that they had violated his Fourth Amendment right to be free from unconstitutional searches. In its reasoning, the court emphasized that humane society officers may not generally claim an entitlement to qualified immunity when they carry out law enforcement activities and that, here, the employees had acted without the knowledge or supervision of any law enforcement officer in performing their undercover search. However, because defendants did not conduct the search without plaintiff's consent and did not seize any property during the search, the court also found that plaintiff had not clearly asserted a valid claim under 42 USC § 1983. Accordingly, the court granted plaintiff leave to file a brief on this issue. Regarding plaintiff's related claim that defendants had also violated his Fourth Amendment rights during their subsequent search, however, the court recognized qualified immunity for the PSPCA employees on the basis that they had acted under close official supervision by seeking and obtaining a search warrant from a magistrate on an adequate showing of probable cause. Under the applicable cruelty statute, the court held that the warrant issued was facially valid, and, therefore, that the search did not infringe upon plaintiff's asserted constitutional rights.

Case	Citation	Summary of the Facts	Summary of the Holding
Hoesch v. Broward Cty.	553 So.3d 1177	After plaintiff's dog attacked and killed a neighbor's cat, animal control officials took the dog into their custody and notified plaintiff of their intent to euthanize the animal by serving him with a "Dangerous Dog Deposition." In response, plaintiff requested a hearing on the matter, but the hearing officer found that the plaintiff's animal satisfied the definition of a dangerous dog under the relevant county ordinance, thereby requiring the dog's destruction. Plaintiff proceeded by seeking declaratory relief in circuit court on the grounds that the county ordinance contravened state animal control statutes. Whereas the county ordinance defined a dangerous dog as one who had killed a domestic animal in a *single* unprovoked incident outside of the owner's property, the state statute defined a dangerous dog as one who had *more than once* killed or severely injured a domestic animal outside of the owner's property. Regardless of the distinction, the county filed and the trial court granted a motion for summary judgment in the county's favor, and plaintiff appealed.	On appeal, the county argued that its ordinance did not contravene the state statute because the statute expressly authorizes local governments to impose heightened regulations and restrictions for dangerous dogs. However, the appellate court rejected this argument on the ground that local governments only acquire such authorization for dogs that are first designated as dangerous within the statutory definition. Therefore, in cases like the present, where plaintiff's dog did not qualify as dangerous under the state statute, the court found that a local government has no authority to impose any additional restrictions or regulations. Instead, the court emphasized the significance of another statutory provision which prohibits local governments from enacting ordinances regarding dangerous dogs that conflict with applicable state law. After it determined that the definition of "dangerous dog" found in the ordinance clearly conflicted with the statutory definition, the appellate court declared the former null and void. Similarly, the court declared a separate ordinance that required destruction of any dog designated as dangerous null and void on the basis that it also conflicted with the relevant state statute. In its analysis, the court reasoned that this ordinance was an unlawful attempt to modify the existing framework created and regulated by state law for addressing dog attacks on domestic animals. Accordingly, the appellate court reversed the trial court's judgment and remanded the case for entry of summary judgment in plaintiff's favor.

Case	Citation	Summary of the Facts	Summary of the Holding
U.S. v. Hackman	630 F.3d 1078	According to undisputed investigation reports, defendants bred, raised, trained, sold and fought pit bull terriers in wagered competitions over the course of several years. As part of their operations, the men held testing matches, after which inferior or injured dogs were regularly abandoned, sold or killed. In the aftermath of one particular fight, the owner of an incapacitated dog attempted unsuccessfully to kill the animal several times by electrocution before the dog finally died. Following an investigation that lasted several months, law enforcement indicted defendants and both men pleaded guilty to conspiring to engage in animal fighting ventures and one pleaded guilty to engaging in animal fighting ventures in violation of a federal statute. On its finding that the defendants' acts amounted to extraordinary cruelty, the district court applied an upward departure provision found in the United States Sentencing Guidelines (USSG) and sentenced both defendants to more than twice the advised maximum length of incarceration for their crimes. On the grounds that the court erred in finding that their conduct constituted extraordinary cruelty and, therefore, erred in applying the upward departure provision of the USSG, both defendants appealed their sentence.	On appeal, the court affirmed the district court's decision to apply the upward departure provision of the sentencing guidelines for conduct that amounts to extraordinary cruelty. Although the guidelines do not explicitly define the term "extraordinary cruelty," the appellate court reviewed the district court's interpretation and application of the guidelines *de novo* within the context of the term's ordinary meaning. While the court acknowledged that the dictionary definition of the term "extraordinary" may cover a range of action of varying degrees from "more than ordinary" to "rarely equaled," it determined that defendants' conduct in this case was so egregious that it clearly fell within the category that the legislature intended to recognize as extraordinary cruelty. Accordingly, the appellate court held that the lower court did not err in its interpretation of the sentencing guidelines. Similarly, on a separate review, the appellate court held that the district court did not abuse its discretion in applying the upward departure provision to lengthen both defendants' sentences. In its analysis, the court reasoned that ordinary cruelty is inherent to dog fighting operations, but that the cruelty exhibited by defendants in this case, particularly in abandoning and brutally executing dogs who were injured or defeated in a fight, was so exceptional as to justify the lower court's exercise of discretion in departing upward from the advisory sentencing guidelines.

Case	Citation	Summary of the Facts	Summary of the Holding
People v. Primbas	936 N.E.2d 1088	A trial judge convicted defendant of killing Shelby, a female Rottweiler owned by defendant's distant relative, in violation of a section of the Humane Care for Animals Act that prohibits a person from committing an act that causes the serious injury or death of a companion animal. At trial, defendant admitted that while working on a car in his mother's garage, he had shot and killed Shelby, who was tied by her leash to a deck post as her owner visited with defendant's mother inside the house. Defendant contended, however, that his intent in firing the pellet gun was merely to scare off what he thought to be a wild animal from his mother's deck, not to shoot his relative's dog. Despite this contention, the trial court did not find defendant's testimony credible. Instead, the court accepted the testimony of Shelby's owner, who claimed that defendant had seen her with the dog on several occasions before this incident and that Shelby was wearing the same distinctive fluorescent orange collar that she always wore when defendant shot her. Based on the evidence presented by Shelby's owner, the trial court held that defendant had intended the consequences of his act in shooting the pet dog and sentenced him to two years of felony probation, which he appealed.	On appeal, the defendant argued that the statute under which he was convicted not only required proof that he had intentionally committed an act resulting in the dog's death, but also that he intended to seriously injure or kill the dog. Defendant asserted that the lower court erred in failing to require the State to satisfy its full burden at trial by establishing the second element relating to specific intent. In reviewing the trial court's judgment, however, the appellate court rejected this assertion on the basis that the trial record reveals that the lower court had found the specific intent element of the crime to be present in this case. Alternatively, defendant argued that the evidence presented at trial was insufficient to establish the element of specific intent required under the statute. The appellate court, however, also rejected this argument. In its reasoning, the court emphasized that the trial court had justifiably relied on circumstantial evidence showing that defendant knew that the animal he was shooting at was Shelby in concluding beyond a reasonable doubt that defendant possessed the requisite specific intent for conviction under the statute. Accordingly, the appellate court affirmed the trial court's judgment that defendant had both committed an act resulting in the death of a companion animal and that he had intended to cause the animal to suffer serious injury or death.

Case	Citation	Summary of the Facts	Summary of the Holding
People v. Romano	908 N.Y.S.2d 520	Under Agriculture and Markets Law § 353, defendant was charged with animal cruelty for unjustifiably injuring her dog by neglecting to groom it for a period of several months and later failing to seek medical care when it became clear that the animal required such attention. Defendant was also charged with falsely reporting the incident to officials, and a jury convicted her on both charges. Defendant appealed her conviction on the basis that the statute under which she was prosecuted was unconstitutionally vague. Specifically, she contended that the phrases "unjustifiably injures" and "necessary sustenance" found within the statutory text are too vague to give a pet owner reasonable notice of their duties under the statute or to withstand a constitutional challenge to its validity. Alternatively, she challenged her conviction on the basis that the evidence at presented at trial was insufficient to support the jury's finding.	On appeal, the court held that the statute was not unconstitutionally vague and that the evidence presented at trial was sufficient to support defendant's animal cruelty conviction. In evaluating defendant's void-for-vagueness argument, the court reasoned that the statutory language, specifically the phrase "unjustifiably injures," was sufficiently definite to give a person of ordinary intelligence notice of the type of conduct prohibited by the statute and to apprise officials of clear enforcement standards. Moreover, in its reasoning, the court emphasized that no reasonable pet owner would fail to seek medical care given the obvious physical ailments that the defendant's dog suffered, and that, based on the evidence presented at trial, it was clear the defendant was indeed aware of the fact that she had neglected and caused the dog unnecessary pain.

Case	Citation	Summary of the Facts	Summary of the Holding
Pearson v. U.S. Dept. of Agriculture	2011 WL 559083	Petitioner operated as a licensed exhibitor of exotic animals, including lions, tigers, and bears, for a twenty years. During a periodic inspection of plaintiff's operation in 1999, employees of the Animal and Plant Health Inspection Service (APHIS) first discovered several violations of the Animal Welfare Act (AWA). Over the next several years, subsequent inspections revealed additional violations and, by 2006, APHIS officials had cited plaintiff for nearly three hundred instances of non-compliance. Among the violations for which petitioner was repeatedly cited were his failure to provide adequate sewage and sanitation, wholesome food, potable water, or adequate veterinary care for his animals. As a result of his continued failure to comply, in 2002, APHIS and the United States Department of Agriculture began administrative disciplinary proceedings, which were delayed for unrelated reasons. Finally, in 2005, the APHIS sent petitioner a letter notifying him of its decision to terminate his license and filed an amended complaint with the administrative court seeking a cease and desist order, $100,000 in civil sanctions, and permanent revocation of petitioner's license. Though the administrative law judge (ALJ) granted the order and issued the permanent revocation, he refused to impose sanctions. Both petitioner and respondents appealed the decision to the Secretary of the U.S. DOA. On appeal, the Secretary issued an order in respondent's favor which imposed nearly $94,000 in sanctions on petitioner. On procedural and substantive grounds, petitioner sought further review.	On petition for review, the Sixth Circuit Court held that the neither the ALJ nor the Secretary had committed any procedural error. Similarly, the Court rejected petitioner's substantive claim that the permanent revocation of his license was not supported by substantial evidence. In its analysis, the Court emphasized that a license may be revoked after only a *single* willful violation of the AWA, and that, in this case, there existed an "overwhelming body of evidence," to include investigation reports, witness testimony, photographs, and exhibition inspections, showing that petitioner had committed *multiple* regulatory violations. Moreover, the Court reasoned that petitioner's perpetual failure to comply with regulatory requirements, despite repeated warnings and citations, established that his conduct was willful. Accordingly, the Court affirmed the Secretary's decision to permanently revoke petitioner's license.

Case	Citation	Summary of the Facts	Summary of the Holding
U.S. v. Stevens	150 S.Ct. 1577 (2010)	Defendant operated a website through which he sold videos of pitbulls engaged in dogfights or attacks on other animals. Based on his sale of these videos, which included footage of American and Japanese dogfights and a graphic depiction of a pitbull attacking a farm animal, the Government indicted defendant on three counts of violating 18 U.S.C. Section 48. Under this federal statute, anyone who knowingly creates, sells, or possesses a depiction of animal cruelty for the purpose of commercial gain is guilty of a crime punishable by up to five years in prison. On the grounds that the First Amendment renders this statute facially invalid, defendant filed a motion to dismiss the charges against him. However, the district court denied his motion, and a jury convicted him of all counts. The court sentenced defendant to nearly three years' imprisonment, and he appealed. On appeal, the Third Circuit Court held that the relevant statute, which it recognized as a content-based regulation of protected speech, could not withstand strict scrutiny review and was, therefore, facially invalid. Accordingly, the Court vacated defendant's conviction, and the Government appealed to the United States Supreme Court, which granted certiorari.	On appeal, the Government argued that the depictions of animal cruelty prohibited by the contested statute are an unprotected category of speech under the First Amendment and are, therefore, the proper subject of statutory regulation. The Supreme Court, however, rejected this argument on the grounds that depictions of animal cruelty should not be recognized among the types of expression that are categorically *unprotected* by the First Amendment. Instead, the Court declared the statute presumptively invalid as a content-based regulation of constitutionally *protected* speech. To rebut this presumption, the Government asserted that the challenged statute's prohibition of animal fighting depictions was plainly legitimate. In response, defendant argued that the statute was impermissibly overbroad since the vast majority of materials it banned were depictions of ordinary and lawful activities. The Court agreed, reasoning that the statute constituted a prohibition of "alarming breadth" because it did not expressly require that the banned depictions involve cruelty; instead, the statute applied to any depiction in which a living animal was merely killed or wounded. The Government contended, however, that the exceptions clause, which exempted any depiction with serious religious, scientific or other value from the ban, sufficiently narrowed the statute's reach to defeat the overbreadth argument. On the basis that such exemptions were still insufficient to narrow the substantially overbroad statute, the Court rejected this argument and invalidated the statute.